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In the Supreme Court of the United States.

OCTOBER TERM, 1898.

THE UNITED STATES, APPELLANT,
v.
THE STEAMSHIP "OLINDE RODRIGUES," La Compagnie Générale Transatlantique, claimant.

No. 704.
In prize.

BRIEF FOR THE UNITED STATES AND THE CAPTORS.

STATEMENT OF CASE.

This is a libel by the United States against the steamship *Olinde Rodrigues* and cargo, in a prize cause for violation of the blockade of San Juan, Porto Rico, on the 17th day of July, 1898.

The steamship is claimed by La Compagnie Générale Transatlantique, a French corporation.

The steamship *Olinde Rodrigues* left Havre early in June, 1898, upon her regular voyage over a West Indian itinerary prescribed by the terms of her postal subvention from the French Government. The proclamation

of the President of the United States declaring San Juan, Porto Rico, in a state of blockade was on the 27th day of June, 1898. On the 3d of July, 1898, the *Olinde Rodrigues* arrived at St. Thomas, and on the next day, the 4th July, 1898, in the early morning, slipped into San Juan, Porto Rico, under the shore batteries. She was seen by the United States auxiliary cruiser *Yosemite*, then blockading the port of San Juan. On the 5th July, 1898, the *Olinde Rodrigues* came out of the port of San Juan, and, after continued signaling with the *Yosemite*, she approached the latter and claimed not to have any knowledge of the blockade of San Juan. Whereupon the boarding officer of the cruiser *Yosemite* entered in the log of the *Olinde Rodrigues* an official warning of the blockade and she went on her way to Puerto Plata and other ports of San Domingo and Haiti.

She returned from these ports, leaving Puerto Plata on the 16th July, 1898, and on the morning of the 17th of July, 1898, she was captured by the United States armored cruiser *New Orleans*, then blockading the port of San Juan, while she was attempting to enter the port of San Juan.

A prize crew was put aboard the *Olinde Rodrigues* and she was taken to Charleston, S. C., where she was libelled as a prize by the United States, and upon depositions taken *in preparatorio* the district court ordered the release of the cargo on the ground that the cargo owners did not appear to have any complicity in the running of the blockade, cargo being mainly West India products

shipped to Havre by innocent shippers; but as to the vessel, the court retained the cause and ordered further proof, and allowed the United States and claimants to put in other testimony as to violation of the blockade, which being done by the United States, the cause came on for hearing in December, 1898, on a motion by claimants to restore the steamship on the grounds:

(1) That the blockade of San Juan at the time of the capture of the *Olinde Rodrigues* was not an effective blockade and capture was illegal.

(2) That the *Olinde Rodrigues* was not violating the blockade when seized.

The district court rendered its decree December 13, 1898, holding that the blockade of San Juan was not an effective blockade, and "that there would have been no attempt to enter the port by the *Olinde Rodrigues* on the 17th of July, 1898, if the blockade had been effective," and ordered the restitution to claimants of the *Olinde Rodrigues*. The district court did not directly pass upon the question of violation of the blockade on the 17th of July, 1898, except impliedly by holding that "there would have been no attempt to enter if such effective blockade had existed at San Juan," thereby holding that there was an attempt to enter, which was held justifiable by the court on the ground of want of an effective blockade at the port of San Juan.

From the decree of restitution the United States appealed and assigns errors under two main heads:

(1) That the court erred in holding that there was no effective blockade of the port of San Juan, Porto Rico, on the 17th of July, 1898.

(2) That the court erred in not finding directly that the *Olinde Rodrigues* was captured while she was violating the blockade of San Juan on 17th July, 1898, and not decreeing condemnation of the said steamship as lawful prize.

The following assignments of errors, numbers from 15 to 30, fols. 411–415, set forth the position of the United States as to the questions of law and fact arising on the actual violation of the blockade of San Juan by the *Olinde Rodrigues* on the morning of the 17th of July, 1898.

VIOLATING THE BLOCKADE.

15. The district court erred in holding "that the presence of the steamship *Olinde Rodrigues* near the port of San Juan on the 17th of July, 1898, is not in anywise a suspicious circumstance. She was rightly there, for this port lay upon her regular route."

16. The district court erred in not holding that the steamship *Olinde Rodrigues*, having been notified of the blockade and warned off San Juan on the 5th July, 1898, by the entry in her log by the United States steamer *Yosemite*, violated the blockade by her return to the port of San Juan on the 17th of July, 1898, and that her duty was not to go near the interdicted port of San Juan, or be found in that neighborhood, or approach so near that she might slip in or run in under the protection of the batteries; and that the claim that she was on her way to St. Thomas did not allow her to pass within the limits of the blockade station, or within range or protection of the batteries of San Juan.

17. The district court erred in finding "that it is not conceivable here that there was any authority from the owners of the ship to attempt a breach of the blockade of San Juan on the 17th day of July, 1898."

18. The district court erred in holding "that no incriminating evidence was found aboard the ship in the shape of instructions to her master, which induced preparations for a breach of the blockade, from which the conclusion follows that any such attempt was the unadvised rashness of an individual and not an instructed and premeditated act."

19. The district court erred in holding and finding "that when the steamship *Olinde Rodrigues* sailed from Puerto Plata on the 16th of July, 1898, there was no premeditated purpose to enter San Juan."

20. The district court erred in holding and finding "there is not a scintilla of testimony from which such premeditated purpose to enter San Juan can be inferred, except the possession of a bill of health for San Juan."

21. The district court erred in not finding and holding that the master of the *Olinde Rodrigues* had, at the time of his capture by the United States cruiser *New Orleans*, on the 17th of July, 1898, several bills of health and manifest for San Juan, as a port of destination, and the instructions, expressed and implied, of the agents of the steamship company (owners of said steamship), at San Juan, Cape Haytien, Port au Prince, and other West India island ports, to enter the port of San Juan, after knowledge of the blockade and warning off San Juan on the 5th of July, 1898, duly entered in the log of the steamship *Olinde Rodrigues* by the United States

steamship *Yosemite*, and that the intent and attempt to violate the blockade of San Juan was actual and the motive adequate at the time of the capture of the *Olinde Rodrigues* by the United States cruiser *New Orleans* on the morning of the 17th of July, 1898.

22. The district court erred in not finding and holding that the master and officers of the steamship *Olinde Rodrigues* refused to deliver up all the ship's papers to the prize master, Lieutenant Russell, of the United States cruiser *New Orleans*, upon his boarding her on the 17th of July, 1898, and particularly that they withheld and concealed the bills of health and manifest for San Juan, as a port of destination, and misrepresented to the said prize master that the papers delivered up to the prize master were all the ship's papers, and, thereafter, that they destroyed the bills of health for San Juan so concealed before they were seen by the captors; and that in the first instance the said master, under oath, in his examination *in preparatorio* denied the existence, concealment, and spoliation of such bills of health and manifest for San Juan.

23. The district court erred in not holding as a matter of law that the possession by the master of the *Olinde Rodrigues* of such ship's papers, bills of health, and manifest, showing San Juan to be a port of destination; the refusal to surrender the same to the prize master on demand; the concealment of the same, and the spoliation of the same before they were seen by the captors, and denial of the same and of their concealment and spoliation in the first instance, together with the other facts and circumstances in evidence in this cause, are conclu-

sive of the intent of the steamship *Olinde Rodrigues* to violate the blockade of San Juan on the 17th of July, 1898, and also that she sailed from her last port of departure with such intention.

24. The district court erred in not holding that the steamship *Olinde Rodrigues*, having been notified of the blockade of San Juan, and having been warned off the port of San Juan on the 5th of July, 1898, by entry in her log by the U. S. S. *Yosemite*, and thereafter, on 16th of July, 1898, having sailed for the port of San Juan with bills of health and manifest for San Juan as a port of destination, violated the blockade of San Juan in so sailing with such intention of entering the port of San Juan.

25. The district court erred in not finding specifically that after notification of the blockade and warning off the port of San Juan on the 5th of July, 1898, by the United States steamer *Yosemite*, the steamship *Olinde Rodrigues*, on 17th of July, 1898, refused to obey the signal of the cruiser *New Orleans* to stop and heave to, and defiantly continued on her course while heading for San Juan, and turned only after solid shot was fired at her by the *New Orleans;* and the court further erred in not holding that such facts are conclusive of her guilt in attempting to violate the blockade of San Juan.

26. The district court erred in not finding specifically that after notification of the blockade and warning off the port of San Juan, July 5, 1898, by the United States steamship *Yosemite*, the actual course of the *Olinde Rodrigues* was carrying her under the batteries of San Juan at the time of her capture, on the 17th July, 1898,

and that such fact is, as matter of law, conclusive of her guilt in attempting to violate the blockade of San Juan.

27. The district court erred in not finding specifically that the *Olinde Rodrigues*, after notification of the blockade and warning on the 5th of July, 1898, by the United States steamer *Yosemite*, was, on the 17th July, 1898, at time of capture by the *New Orleans*, running in under the protection of the batteries of San Juan, defying the warning and signal to stop and heave to, and drawing the cruiser *New Orleans*, in pursuit of her, within the range of the San Juan Morro, and shore batteries; and the district court erred in not holding as matter of law that such fact raises a presumption de jure of her guilt in violating the blockade of San Juan and condemns her as a lawful prize of war.

28. The district court erred in not holding as a matter of law that the violation by the *Olinde Rodrigues* of the blockade of San Juan on 17th July, 1898, after notification of the blockade and warning off the port of San Juan by the U. S. S. *Yosemite* on 5th July, 1898, makes her liable to condemnation as a prize of war equally whether the owner or agent of the owners instructed it, or whether the act was premeditated at the port of departure, or whether such act was that of the master alone under an intention formed only at the time.

29. The district court erred in not holding that, "if through error of judgment the master of the *Olinde Rodrigues* concluded that there was no effective blockade and attempted to go into port," the *Olinde Rodrigues* was still liable to condemnation as a prize of war for

violating the blockade upon actual capture in such attempt by the United States cruiser *New Orleans* on the 17th July, 1898, after notification of such blockade and after warning off the port of San Juan on 5th July, 1898, by the United States steamship *Yosemite*.

30. The district court erred in not decreeing the condemnation of the steamship *Olinde Rodrigues* as a prize of war captured by the United States cruiser *New Orleans* for violating the blockade of San Juan on the 17th July, 1898, after notification and warning thereof on 5th July, 1898, by the U. S. S. *Yosemite*.

We submit the questions made by these sixteen assignments of error as to violation of the blockade in seven propositions, as follows:

ARGUMENT.

THE ACTUAL VIOLATION OF THE BLOCKADE OF SAN JUAN.

I.

THE INTENTION OF THE "OLINDE RODRIGUES" TO RUN THE BLOCKADE, AND THE FACT THAT SHE WAS VIOLATING BLOCKADE CLEARLY APPEAR FROM HER POSSESSION OF BILLS OF HEALTH AND MANIFEST FOR SAN JUAN, AND THEIR CONCEALMENT AND DESTRUCTION.

1. The intention to run the blockade is evidenced by having the bills of health for San Juan, obtained and delivered to the captain by the agents of the company at ports on the eastward voyage, after the warning entered

in the log of the *Olinde Rodrigues* by the United States steamer *Yosemite*, on the 5th of July, 1898, off San Juan.

2. By concealment of these bills of health by captain, on delivery of the ship's papers to prize master.

3. By the destruction of the bills of health by captain, without having been seen by the captors.

4. By the concealment, under fraudulent oath of the captain as to such papers, on the 2d of August, 1898, upon his first examination *in preparatorio*, when he denied such papers, or their concealment or destruction, swearing he delivered *all* papers to prize master.

5. By his attempted explanation of bills of health on the 5th of August, having denied them in the first instance on August 2 and only admitting them after he found the purser would swear, as he did on August 5, that the captain had told him to destroy them. (See date depositions of captain August 2, purser August 5, captain's explanation August 5, fol. 38, 40, 43, 80, 88.)*

6. By his stating in explanation that the bills of health from *last* port only counted, and that was the reason why he did not deliver to the prize master the Spanish bills of health. This statement is untrue on its face, for the several bills of health he did deliver to the prize master on French account, destination being *Havre;* and on Danish account, destination being *St. Thomas,* from the ports at which he touched going eastward, shew that *all* these several bills of health "*count*" and are all necessary to enter the respective ports. The rule and law of all the world is that the consul of each nation at the port

* The folio references are to the marginal paging in the record.

gives a bill of health to allow vessel to enter the port of destination of his nationality. See bills of health in evidence from the several *Danish* consuls for *St. Thomas*, and from the several *French* consuls for *Havre*. The bills of health from the several *Spanish* consuls for *San Juan* are destroyed.

Bills of health delivered to prize master.

Date.	Consul.	Place.	Destination.
July 9	French ...	From St. Marc, Haiti	"Au Havre avec escales."
July 11	.....do	From Gonaives, Haiti	None.
July 13	.....do	From Port au Prince, Haiti	Havre.
July 14	.....do ..	From Cape Haitien	Do.
July 15	.....do	From Puerto Plata	Do.
See Record, fol. 95–103.			
July 13	Danish ...	From Port au Prince.....	St. Thomas.
July 14	.....do	From Cape Haitien.....	Do.
July 15	.....do	From Puerto Plata	Do.
See Record, fol. 98–103.			

These consuls gave bills of health for ports of their own nationality.

On July 13, at Port au Prince, he took *Danish* bill of health expressly for St. Thomas, and *French* bill of health for *Havre*, because he was bound for *both places*.

In same way he also took *Spanish* bill of health expressly for *San Juan*.

These Spanish bills of health he has destroyed, because their *destination* was San Juan, thus leaving his apparent destination only St. Thomas and Havre.

If he had also destroyed the Danish bills of health his apparent destination would be *only* Havre.

The spoliation of papers is therefore directly on the very issue in this case, *destination* to San Juan, in order to conceal his destination expressed on ship papers. (See in full evidence bills of health delivered up to prize master, Record, fol. 95–107.)

BILLS OF HEALTH—EVIDENCE AS TO SAME.

The testimony fully confirms the position above stated. Captain Pherivong, of the *Olinde Rodrigues*, fol. 80, question 20, testifies on August 2:

> Papers were clearance, etc.; bills of health, etc. None of papers *concealed* or *destroyed by anyone.*

Idem, question 35:

> All his papers were perfectly true and regular. They were all true and correct. They were obtained from the *agent of the company* and the *various consuls;* they were obtained for this vessel only. * * * Does not know whether any fees were paid, but supposes some *fees were paid.*
>
> Made report to Washington; does not wish to tell; he will not tell you contents of the paper whatever; he has been deprived of his papers; will not tell contents of what he has written (fol. 82–83).

Darondeau (purser of *Olinde Rodrigues*), August 5, testifies:

> The prize officer asked for the papers of the steamer. I was at my table and brought him there to look at the papers. I gave him *all* the papers. He said: "Give me the papers." I then put the papers together and brought them in the saloon before the captain (fol. 32).
>
> Papers were given me by consignees of steamer at *Port au Prince*, at time of sailing. I found in

the box of papers one manifest of freight in ballast. As to bills of health that is not my matter, and I said to the captain "we don't want it," and he said "all right you *can tear it*," and I put it *away in the corner; and in Cape Haytien* it was the same thing absolutely to my recollection these clearance papers were given gratuitously. The captain told me we were not going to San Juan, and I did not care and put them in the office because I had no need of them. * * * I paid no more attention to these papers and *put them away in the corner* (fol. 37).

Night before arrival in Charleston [i. e., after capture] the doctor says to me, "I have a bill of health, *Spanish account*, from Cape Haytien and Port au Prince," and I told him I would speak to the captain and ask him what I should do with these papers that I found in assorting my papers, these papers in the pigeonholes. I told the captain that morning and he told me we had better destroy them because we don't want them; that it is not our expedition, and that a true exposition is valuable only for the last port to the Spanish port. I came into the stateroom of the doctor—he was yet asleep—and I asked him for his bills of health from Cape Haytien and Port au Prince, and I took them with mine and the balance of merchandise and I tore it and put it in my wastebasket. (Answer 17, fol. 38.)

I showed the boarding officer all the papers of the steamer excepting the papers about which I have spoken. (Answer 23, fol. 40.)

This testimony of the purser therefore shows that—

(*a*) All bills of health, Spanish account, destroyed.

(*b*) All clearances, Spanish account, destroyed.

(*c*) Captain said, after capture, better destroy them because not our expedition.

Captain Pherivong (fol. 87), master of the *Olinde Rodrigues*, having denied on *August 2* concealment and destruction of any papers, on *August 5*, date of purser's testimony, coming back as a witness, says:

> At Port au Prince and Cape Haitien our agents gave us bill of health and manifest of no cargo for Spanish ports.
>
> July 14, dispatch from *agent* at San Juan.
>
> We would have to take 50 passengers first class.
>
> From Puerto Plata my clearance was for St. Thomas. By their laws this last clearance from the last port was the only legal one.

The reason of retention of these papers, he says, is that "they did not form a part of the clearance of our ship for our itinerary and left in the pigeonhole where they were. I told the purser in Charleston good for nothing, and to tear them up" (fol. 88).

This reason is untrue, because *all* bills of health and manifests from *all* ports are part of papers and show destination, just as the other bills of health, French and Danish, show destination to St. Thomas and Havre, respectively.

Girny, head steward of the *Olinde Rodrigues*, testifies:

> Usual ship's papers delivered to prize master, none burned or destroyed; and best proof of their not being destroyed is that Mr. Russell, as soon as he came on board, took charge of them (fol. 58, 59).
>
> No papers exepting those delivered to prize master.
>
> The prize master has gotten *all* the papers (fol. 61).
>
> The papers *all signed* by *consuls* and obtained for this vessel only (fol. 61).

Landgren, first officer of the *Olinde Rodrigues*, testifies:

> All papers regular and in form; that is *the affair of the purser*. He receives all of these papers (fol. 66).
>
> All customary ship papers given to prize master. None were destroyed or concealed, as far as he knows (fol. 68).
>
> At time of capture the officer of *New Orleans* took *all* their papers (fol. 70).
>
> All papers regular. They were to go direct to St. Thomas. Obtained from consuls. Could only be used on *Olinde Rodrigues*, and not other vessel. The *consuls* gave them to the agent of the boat, and the agent gave them to the purser. Does not know if any fee paid; supposes the consuls got their fees. The ship in port when passports delivered to us (fol. 72).
>
> Papers perfectly correct when taken by Mr. Russell (fol. 73).

Lieutenant Russell, of the United States cruiser *New Orleans* (fol. 189), prize master, testifies:

> I went in saloon with captain and purser and demanded to see *all* the ship's papers; certain papers furnished me said to be *all* the ship's papers.

Upon such concealment, suppression, and spoliation of papers, and denial in *first instance* of such concealment and spoliation of papers, the legal principles are well established, as the following authorities shew:

In *Two Brothers* (1 Robinson, 131, 133–134), Sir William Scott says:

> Besides, the matter is entitled to less credit, from a circumstance which came out on the examination, "that he burnt some of the letters before capture."

These, it is said, were only the private letters of some women. Now, *no rule can be better known than that neutral masters are not at liberty to destroy papers.*

In all cases it must be considered as a proof of *mala fides;* and where that appears it is an universal rule to presume the worst against those who are convicted of it. It will always be supposed that such letters relate to the ship or cargo, and that it was of material consequence to some interests that they should be destroyed.

Besides, the fact does not come out, on the master's deposition, with great frankness. It is added by interlineations afterwards, when this circumstance had been disclosed by another witness whose credit had been attacked.

The mate also suppresses the circumstance, and it is one which he could not but know. It is a suppression which very much impeaches his credit also.

The case at bar is like this case—destruction denied by master at first, though confessed afterwards, only when he found that the steward would not perjure himself.

The case at bar is stronger than this case, because the bills of health and manifest destroyed contained the evidence of the destination of the steamer to San Juan, expressly appearing on their face—in the same way as *French* bills of health in evidence expressly shew *Havre* to be a port of destination, and *Danish* bills of health shew *St. Thomas* to be a port of destination. The *Spanish* bills of health shewed *San Juan* to be destination. This is destruction of the *certain* evidence of guilt—*destination.*

The destruction or "spoliation" of papers, and even, though to a less degree, their concealment, is

theoretically an offense of the most serious nature, the presumption being that it is effected for the purpose of fraudulently suppressing evidence, which, if produced, would cause condemnation. The French Regulations of 1704, repeated in 1744 and 1778, declared to be good prizes all vessels, with their cargoes, on simple proof of the fact that papers had been destroyed, irrespective of what the papere were; but the severity of the rule has been tempered in practice, it being commonly required that the destroyed papers hould be proved to be such as in themselves to entail confiscation. * * * If the circumstances are not clear; if, for example, spoliation takes place when the capturing vessel is in sight, or at the time of capture, or subsequently to it, without the destroyed papers having been seen by the captor, further proof would probably be shut out, as, of course, the natural inference from the circumstances being that they have been destroyed because their contents were compromising. (Hall's International Law, pages 760–761.)

Pistoye et Duverdy, ii, 73, citing the case of *La Fortune*. But in the case of the *Apollos* the rule was pressed with extreme rigor. A prize was wrecked at the entrance of the port of Ostend; at the moment when it grounded the captain snatched the ship's papers from the prize master, and on getting to shore at once lodged them with the *juge de paix*. They established the neutrality of the ship and cargo, and there was no reason to believe that any of the number had been abstracted, but it being possible that in the confusion some might have been destroyed, the penalty of proved destruction was inflicted. (Id., p, 761, note.)

In case at bar the purser's admission of *Spanish* bills of health makes their *destination San Juan*, and their

admitted destruction to conceal *destination* is a presumption that is natural and irrebuttable in this case.

In the *Andromeda* (2 Wall., 489–490) doubt was removed by spoliation of papers, and vessel *condemned* (see in full).

In the *Circassian* (2 Wall., 153) this court say:

> Finally it is proved that on the eve, and almost at the moment of capture, the captain ordered the destruction of a package of letters put on board the ship, after she had cleared from Bordeaux, at Pauillac, a town on the Gironde, nearer the sea. These letters doubtless related to the ship, the cargo, or the voyage; probably to all. Their destruction would be a strong circumstance against the ship and cargo were the other facts less convincing; taken in connection with them, it irresistibly compels belief of guilty intent at the time of sailing and time of capture.

In the case at bar not only were papers concealed and destroyed but falsified in the first affidavit. There was false denial until the purser testified.

In *The Adula* (89 F. R., 361) (1898), the court say directly upon the point:

> He made a complete schedule by name of the different papers, and swears that all of them were delivered, without suppression or fraud, to the prize commissioners. The dissappearance of the passport for the ship to any Spanish port, rather more than the passport itself, is therefore of great significance as affecting her character, and the production of a certified copy from the Spanish consul would not throw any light upon the controversy. Spoliation or destruction of a paper of this character is strong proof of guilt. (The *Pizarro*,

2 Wheat., 227; the *St. Lawrence*, 8 Cranch, 434; the *Fortuna*, 2 Wheat., 161, 3 Wheat., 236.)

In *the Adula* (89 F. R., 355) the court again say:

> Again we are assisted by the lucid announcement of Mr. Justice Story in the Pizarro, supra.
>
> "Nor should the captured crew have been permitted to be reexamined in court. They are bound to declare the whole truth upon the first examination; and, if they then fraudulently suppress any material facts, they ought not to be indulged with an opportunity to disclose what they please, or to give color to their former statements, after counsel has been taken, and they know the pressure of the cause. Public policy and justice equally point out the necessity of an inflexible adherence to this rule." * * *
>
> The allowance would hold out the strongest temptation to subornation of perjury.

The first examination of Captain Pherivong, denying the destruction of papers and fraudulently swearing to nonconcealment and nondestruction, is therefore final and condemns him utterly.

In *the Pizarro* (2 Wheaton, 227-241) this court has fixed the limit for explanations.

> Concealment, or even spoliation of papers, is not of itself a sufficient ground for condemnation in a prize court. It is, undoubtedly, a very awakening circumstance, calculated to excite the vigilance and justify the suspicions of the court. But it is a circumstance open to explanation, for it may have arisen from accident, necessity, or superior force; and if the party in the first instance fairly and frankly explains it to the satisfaction of the court, it deprives him of no right to which he is otherwise

> entitled. If, on the other hand, the spoliation be unexplained, or the explanation appear weak and futile; if the cause labor under heavy suspicions, or there be a vehement presumption of bad faith, or gross prevarication, it is made the ground of a denial of further proof, and condemnation ensues from defects in the evidence which the party is not permitted to supply.

In this case the master did not in the first instance fairly and frankly explain, but denied both concealment and destruction. His explanation is, moreover, not only weak, but untrue, as all health bills count, and not only the health bill from last port, as witness the Danish and French health bills from *all* the ports, with Havre and St. Thomas, respectively, as destination.

By this rule Captain Pherivong, after he had denied concealment and spoliation of bills of health, in first examination, could not be reexamined as to the same. He should in the *first instance*, Judge Story says, confess and explain, if he could, the concealment and spoliation of papers.

In *The Fortuna* (3 Wheaton, 236, 239), this court says:

> Had there been nothing fraudulent intended, these papers ought to have been delivered along with the documentary evidence. But they were not discovered until betrayal by one of the crew. It is upon the investigation of these papers, principally, that the circumstances occur which discover the true character of this voyage.

In the case at bar the purser, after the captain's denial, refuses to perjure himself, and implicates the captain as ordering him to destroy them in Charleston, not having been seen by the captors.

See also Upton's Maritime Warfare and Prize, pages 324, 325, 326, for a full exposition of spoliation of papers.

FINALLY SAILING WITH THESE BILLS OF HEALTH AND MANIFEST *for San Juan* was itself a VIOLATION OF THE BLOCKADE. (The *Circassian*, 2 Wall., 151.)

In the language of the Chief Justice, speaking for this court:

> It is a well-established principle of prize law, as administered by the courts, both of the United States and Great Britain, that sailing from a neutral port *with intent* to enter a blockaded port, and with knowledge of the existence of the blockade, subjects the vessel and, in most cases, its cargo to capture and condemnation. We are entirely satisfied with this rule. It was established, with some hesitation, when sailing vessels were the only vehicles of ocean commerce; but now, when *steam and electricity* have made all nations neighbors, and blockade running from neutral ports seems to have been organized as a business, and almost raised to a profession, it is *clearly seen to be indispensable to the efficient exercise of belligerent rights.* (The *Circassian*, 2 Wall., 151, 152.)

Having been warned on July 5, 1898, officially of blockade of San Juan by an entry in her log by United States steamer *Yosemite* off San Juan, it was a violation of the blockade to sail from Puerto Plata on July 16, with these documents fixing San Juan as a port of destination.

II.

THAT THE OLINDE RODRIGUES WAS RUNNING THE BLOCKADE APPEARS ALSO CONCLUSIVELY BY THE POSITIVE TESTIMONY OF ALL OF THE OFFICERS OF THE NEW ORLEANS, BOTH WHEN THEY FIRST SAW HER AND ALSO WHEN THEY FIRED A SHOT AT A DISTANCE OF 5 MILES, WHEN SHE WAS TO THE WESTWARD PLAINLY VISIBLE WITH HER MASTS WIDE OPEN, RUNNING SOUTHWARD TO SAN JUAN, AND ALMOST WITHIN THE PROTECTION OF THE BATTERIES. THIS IS CONFIRMED ALSO BY THE TELEGRAPH OBSERVER, LARA, AT MORRO CASTLE.

The testimony is as follows:

Captain Folger, of the United States cruiser *New Orleans*, looking *westward* at *Olinde Rodrigues:*

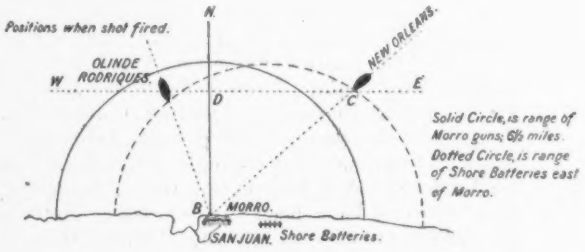
> When first seen, the impression made on me was that she was steering due south (fol. 157). Had anybody at that time (when shot was fired) told me that she was bound for any other port than San Juan, I should have considered him mad (fol. 159). When I saw her, her masts were *wide open* as if you were looking from a point perpendicular to her keel; her masts retained that relative position until shot was fired, when she changed her position, bringing her two masts into one over an angle of five points, and headed for the *New Orleans* (fol. 161). Being *to the west*, she must have been steering nearly south, for her masts were *wide open*, being observed from the eastward (fol. 157).

See also the chart marked by Captain Folger, showing successive courses made by the *New Orleans* from west

half south, west by south, and west-southwest, and *finally down to southwest*, heading for Morro, in order to head off the steamer in the chase (fol. 160, 161, 162). She must have been going to the southward to have required the cruiser to change her course constantly to the south to head her off.

Again, Captain Folger said, "Finding the *Olinde Rodrigues* was drawing across my bows and would reach San Juan before I could stop her, I put my helm to starboard, bringing my head to port farther, so as to bring her back to the position on my *starboard bow*" (fol. 172). The following diagram shows the *New Orleans*, $7\frac{2}{3}$ miles from Morro, on a course southwest when she fired the shot, having the *Olinde Rodrigues* on her *starboard bow* with *masts wide open*, 5 miles away. The *Olinde Rodrigues* must have been steering to the south or to San Juan.

See Lieutenant Rooney's testimony, fol. 314–319.



She was 5 miles away to *the west*, with her masts *wide open* when I fired the shot. (Folger, fol. 158, 175.)

Lieutenant Russell, of the cruiser *New Orleans*:

> The *Olinde Rodrigues* was drawing steadily to the south; reported to commanding officer that steamer was heading in toward harbor of San Juan, and after shot steamer made a wide turn and headed toward the *New Orleans*. She was heading very slightly to the west of Morro Castle until after shot was fired (fol. 187, 196). After shot was fired *Olinde Rodrigues* steered in an *easterly* direction to come to us (fol. 204, 208); she had changed her course to come to us in an *easterly* direction (fol. 209).

Blakeley, watch and division officer United States cruiser *New Orleans:*

> Course of the *Olinde Rodrigues* was southerly, heading apparently for San Juan, about for San Juan Harbor entrance. She was heading for the land; absolutely impossible on that course to have gone clear of the land. Her masts were *wide open* when I first observed her, and remained wide open until shortly after we fired the shot. She came to us parallel with the coast line—about east (fol. 211, 212, 221). My opinion is based upon the fact that her masts were wide open and appearance of ship as viewed from our ship; appearance of hull, mast, and smokestack (fol. 216). Observation as when I first saw her at 8 o'clock and also the time the shot was fired, about 4½ miles from her, when *her course was the same, heading about south, as it appeared to me, and masts wide open* (fol. 212, 221). I mean by *wide open* as far apart as they could be. She could not have been on a course south 69 east and her masts wide apart, wide open; they would have been partly closed toward each other (fol. 222).

It will be noted that Blakeley was watch and division officer from 8 o'clock, and was the officer of the deck of the cruiser *New Orleans* at the time shot was fired.

C. B. Nelson, naval cadet on *New Orleans*:

> Was in forward military top of the *New Orleans* when we first saw steamer. She was apparently heading inshore. She seemed to be almost north of the entrance of San Juan, and, from what we could see from the position of her masts and broadside of vessel exposed, very nearly south—maybe a little to the east, south by east. I observed until she was hove to. Until we fired (at that time we were heading for the Morro) she was bearing on our starboard bow. When she was fired at her masts were well apart; from the ship we could see the whole broadside, masts were wide apart, and we could see everything between the masts (fol. 224, 225). Impossible for her to have gone clear of the land. After shot was fired she came to the *New Orleans* in an *easterly direction* (fol. 226).

Lara, Spanish telegraph observer at Morro, San Juan, July 17, 1898:

> Could see the *Olinde Rodrigues* with his plain eye. Her course was directly to the Morro. She was pointing to the Morro; was coming in the direction of the port (fol. 273). After she changed her course, going toward the *New Orleans*, toward the east; *only changed her course after shot was fired. Before shot* was fired could only see one mast—front one; *after shot was fired, both masts* (fol. 274). He was instructed from the governor's palace in San Juan to look out for the *Olinde Rodrigues* and reported her as coming into the port (fols. 275, 276, 277).

It is to be specially noted that all the testimony of these officers of the *New Orleans* (expert naval men) is not only from their observation when the *Olinde Rodrigues* was

first sighted, but also from their direct, clear, full observation of the *Olinde Rodrigues* at the time shot was fired, when the *Olinde Rodrigues* bore west from the *New Orleans*, and on her starboard bow within 5 miles of the *New Orleans*, and clearly visible on a bright summer morning.

Moreover, the observation of Cadet Nelson, of the *New Orleans*, was from the forward military top of the cruiser and that of observer Lara from the tower of Morro, San Juan.

There can be no doubt as to the accuracy of these observations and the certainty of the fact on this concurrence of testimony by observers at different points.

III.

THAT THE "OLINDE RODRIGUES" WAS VIOLATING THE BLOCKADE CONCLUSIVELY APPEARS AGAIN FROM THE FACT THAT THE "OLINDE RODRIGUES" REFUSED TO OBEY THE SIGNAL FROM THE "NEW ORLEANS" TO HEAVE TO AND STOP INSTANTLY AND TURNED ONLY AFTER THE SHOT WAS FIRED.

That she saw the signal "JW" appears from log of *Olinde Rodrigues*, right-hand page 32, "*7.50 apercu un navire de guerre;*" "*8.10 il signale "JW"* (at 7.50 we saw warship; at 8.10 it signals JW). This signal "JW" means, "Heave to and stop instantly." (See page 2, Part I, International Code Signals. Spottswoods etc., London, 1885.)

Captain Folger, of the *New Orleans* (fol. 158), testifies:

> Before shot, some time previously, I had hoisted a signal which was in plain sight. The order to heave

> to, which he was bound to obey, was in plain sight for several minutes.

It is clear, therefore, that the signal was made and seen. It was also disobeyed.

The claim by Captain Pherivong, of the *Olinde Rodrigues*, that "Upon appearance of man-of-war he turned and ran toward her before shot was fired" (fol. 83) is inconsistent with his log, which is "apercu un navire de guerre 7.50, il signale JW, 8.10, mis le cap dessus" ("saw warship at 7.50; it signals JW at 8.10, and we turned our head to him").

By the log it appears they ran from 7.50, when they saw the cruiser, to 8.10, when she signaled, i. e., *twenty minutes* before they turned to the cruiser. Yet the captain, Pherivong, swears that "upon appearance of man-of-war he turned and ran toward her before shot was fired" (36 interrogatory, fol. 83), and again, "he had already turned his vessel on our warship before the gun was fired; *as soon as he* saw it he turned his vessel toward it." (5 interrogatory, fol. 75, 76.) Captain Pherivong is contradicted by his log, by which they ran twenty minutes *after* they saw the *New Orleans* before they turned.

He is also overwhelmingly contradicted by Girny, head steward of *Olinde Rodrigues*, and by all the officers of the *New Orleans*, and by Lara (observer at Morro), in his swearing that *Olinde Rodrigues* turned toward the *New Orleans* before shot was fired. The testimony is as follows:

Captain Folger:

> After signal, finally shot was fired, and he brought up immediately afterwards. He was caught, and

being discovered under range of my guns, some seconds after he put his helm to starboard and headed for me. (See full account, Folger, fols. 158, 159.)

Lieutenant Russell, who fired the gun, describing the first shot:

> It fell about half a mile ahead of steamer. The steamer proceeded on her course, heading for the harbor of San Juan. Gave order to reload. Just about to get ammunition. The steamer made a *wide turn* and headed toward the *New Orleans*. (See account in full, fol. 188.)

Blakely, watch and division officer of the *New Orleans* (fol. 212):

> *Shortly after* we fired the shot, when the observation was made, "She is turning," and we all carefully watched her with glasses and saw her go through the change from wide open (masts) to closing gradually until she finally headed for us.

Nelson, naval cadet in forward military top of the *New Orleans* (fol. 226):

> Q. When the shot was fired did she change her course?
>
> A. Not immediately; she changed her course shortly after that, before they had time to fire a second shot. She held the course, I suppose, a half minute and they were about to reload, but before they could reload she ran to and headed for us.

Lara, observer at Morro (fol. 273, 274):

> *Olinde Rodrigues* was coming in direction of port and changed her course only *after* the shot was fired. After that she was going toward the *New Orleans*.

Auguste Julien, a British subject, a first-class passenger on the *Olinde Rodrigues*, also testifies:

> The captain boasted in his presence of having forced the blockade, of which he was aware. (21 and 22 answers, fol. 25, 26.)

And also:

> His opinion is they would enter San Juan if they could, both because the captain boasted of running blockade before, and also because they never could get an answer—definite answer—from any of the officers as to where they were going, and when leaving Port au Platte they generally state where the destination is, but at this time nothing was posted as to destination. (24 answer, fol. 26; 30 answer, fol. 30.)
>
> He could see the houses of San Juan very distinctly *without glasses* from the ship at the time of capture. (36 answer, fol. 29.)

Robert Rabb, cook of *Olinde Rodrigues*, a citizen of France, testified:

> He heard from the passengers and among the crew they were trying to enter San Juan. (fol. 49.)

Girny, head steward of the *Olinde Rodrigues* (36 question):

> Her course was not altered on the appearance of the war ship. It was always the same, excepting when the cannon was fired (answer 36, fol. 61).

Here we have the concurrent overwhelming testimony of all the officers of the *New Orleans*, three witnesses from the *Olinde Rodrigues*, and the telegraphic observer at Morro tower, San Juan, that the *Olinde Rodrigues* only turned on and after the shot which compelled them

on the alternative of destruction to heave to. It was only when they found themselves at the mercy of the United States cruiser *New Orleans* and under her guns that she turned as an alternative then of immediate broadsides and certain destruction, after they had defied the signal and attempted to run under the guns of Morro in disobeying it.

This appears again by the remark made by the paymaster to the captain (see fol. 182, Folger; fol. 192, 193, Russell), who inquired of Lieutenant Russell when he boarded her, "How fast do you steam?" Mr. Russell replied, "21 knots." Then the paymaster said, "It would not have done us any good, anyhow," in French, an admission that with the cruiser *New Orleans* at that speed plunging down on them, to continue to defy and disobey and to run into port San Juan as they first attempted was useless, and the best policy and sure safety for life then was to heave to under the shot, rather than risk instant destruction from her broadsides getting every moment into closer range.

It is to be noted also that the *New Orleans*, on her course southwest at that time (time she fired the shot), heading for Morro, $7\frac{2}{3}$ miles distant, was within $1\frac{1}{6}$ miles ($7\frac{2}{3}$ minus $6\frac{1}{2}$) of the range of Morro guns, and about within the range of the guns of the shore batteries to east of Morro for 3 miles. To run a mile or so more, or three minutes more, on this course to head off the *Olinde Rodrigues* would certainly draw the cruiser *New Orleans* under the guns of batteries of Morro and shore batteries to the east. The chase had to end there or else the *New Orleans* would encounter the peril of an engagement

with the enemy's batteries if she proceeded further in her effort to head off the *Olinde Rodrigues* from San Juan.

It is also to be noted that the *Olinde Rodrigues* was herself nearly within the range and under the protection of the batteries at the time the shot was fired, as Captain Folger said, "I turned to my officer and said. I fear we have lost him; he will get in before we stop him" (Folger fol. 158). On this state of fact, overwhelmingly established, the law is fully settled.

The following case of the *Charlotte Christine* (6 Rob., 101), decided by Sir William Scott, and followed by the Supreme Court of the United States in the case of the *Cornelius* (3 Wallace, 214, 225), is in many particulars identical with this case, on the grounds on which the vessel was condemned.

(1) The vessel claimed to be on the "ordinary course to Caen, France, though she attempted to break the blockade of Havre.

(2) She claimed, as here, that "*she brought to upon first appearance*" of the cruiser.

(3) Permission was given by the court to the captors (officers of the cruiser), as here, to answer this representation.

(4) She actually refused to bring to after notice, except on shot fired.

(5) She was almost under protection of batteries, drawing cruiser under batteries.

On this state of fact the court, Sir W. Scott, say (*The Charlotte Christine*, 6 Rob., 101):

> This was the case of a Danish vessel, with a cargo of timber, taken off Cape La Heve, and proceeded against on the ground of a breach of the blockade of the Seine.
>
> On the original depositions the master had stated that he was bound from a port in Norway to a market in France; that he was apprised of the blockade of Havre; that on his passage he was warned not to enter any of the French ports as far as Fecamp, which were put under blockade August 9, 1804; that he came to Beachy Head and sailed from that port with an intention of proceeding to Caen; that he had come off Cape La Heve for the purpose of taking a pilot for Caen; that he had sailed in sight of the British frigates for some hours before the capture, and that he had brought to on the first appearance of the boat that came off to examine him; that he was actually sailing for Caen, and had no intention of breaking the blockade of Havre. Permission was given to the captors to answer this representation, and affidavits were now exhibited from the commanding officer and other officers and men of the capturing vessel, which stated the vessel to have been in tow by a pilot boat and making for the shore when she was first hailed; that she refused to bring to until the captors were obliged to fire a shot at her; that she was so near to the shore as to be almost under the protection of the batteries, and that several shots were fired from the batteries at the capturing boat; that she was steering in for the shore when she was first perceived. * * *
>
> According to the master's account, it was only for the purpose of taking a pilot for Caen that he made for Cape La Heve; and that is represented to be the

point where pilots usually apply for Caen, which could not be so well approached on the other side. That this may be the ordinary course for Caen is not improbable, but the practice must, I conceive, have been a little interrupted by the continuance of the blockade of Havre. (Idem., 102.)

* * * There was then no necessity to go in farther, yet he continued to approach the shore, and after he had been hailed by the captors and had refused to bring to on the first notice This view of his conduct does, I think, warrant, and indeed compel the court to hold that whatever the equivocal cause of such a situation may be, a person can not be allowed to approach so near to a blockaded port as to place himself *almost* within the effectual protection of the shore and with no necessity existing. To allow such an approach would render the whole purpose of blockade perfectly nugatory. (Idem., p. 103.)

What had he to do then but to have waited where he was, and where he had passed the frigates, as he says, without being considered to be in a suspicious situation? Instead of this prudent and natural course of conduct, he continued to approach, and in defiance of the captor's boat, since it appears that he did not bring to until a gun was fired at him. The extreme imprudence of this behavior, and the great improbability that any person would so act but from some sinister motive, lays him under the unavoidable imputation of being engaged in an attempt to break the blockade. It is a possible thing that his intention was innocent, but the court is under the necessity of acting on the presumption which arises from such a conduct, and of inferring a criminal intention. (Idem., 103–104.)

This case is cited, approved, and quoted from on this very point, in the last four lines above, by the United

States Supreme Court in the case of *The Cornelius*, 3 Wallace, 214, 225.

The same doctrine is announced and enforced in *The Apollo* (5 Rob., 286, 289–90). Sir William Scott says:

> It may be so; but he could be under no doubt as to his negative duty, as it may be called, that he was not to go into the blockaded port. It must be clear and obvious to him that the neighborhood of the blockaded port can not be considered as the fit locus deliberati for his future plans. If the court was to admit that a master might lie to, and call a council of his own thoughts, or of those of his crew, in such a place, the rights of blockade could no longer exist to any purpose; he would stay, in all cases, until an opportunity offered of slipping into the interdicted *port*. It would be practically inconsistent with the exercise of this right of war to hold that the blockading force is bound to stay by him and wait for the result of his deliberation in this suspected place. On the contrary, his first duty is obvious, *fuge litus;* that neighborhood is, at all events, to be avoided. He is bound, on the first notice, to take himself out of an equivocal situation, and if he obstinately refuses and neglects so to do, this court will hold, till it is corrected by the judgment of the superior court, that such a conduct will amount to a breach of the blockade, and subject the vessel to condemnation. Then what is the fact? The master declared, according to the deposition of himself and of the other witnesses, not only "that he must go," which, it is said, would be the same expression in German as "that he ought to go," but also that "he will go" to Dieppe, and after due warning he is still found near the same place, with the ship's head toward Dieppe. Taking this representation to be true, as I am bound to do, it appears incredible to me, I confess, that he

should, as he now asserts, have acted in this manner without any intention of going into Dieppe. If, however, it is possible that this assertion can be true, I have only to lament, as I have abundant occasion to do, the folly and obstinacy of masters who will place themselves in situations which it is impossible for the court to admit to be innocent, without breaking down all the rules on which alone the principle of blockade can be sustained. On these grounds I feel myself obliged to pronounce this vessel guilty of a breach of the blockade, and consequently subject to condemnation.

The defiance of the signal to "Stop instantly and *heave to*," and continuing on his course until brought to by a shot, as in case at bar, is very much stronger than this case of the *Apollo* condemned by Sir William Scott. (See also *The Shepherdess*, 5 Rob., 262.)

IV.

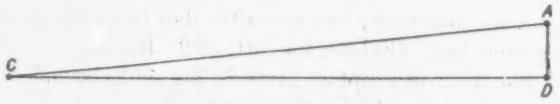
THAT THE "OLINDE RODRIGUES" WAS RUNNING THE BLOCKADE APPEARS AGAIN CONCLUSIVELY BY THE FACT THAT THE ACTUAL COURSE OF THE "OLINDE RODRIGUES" BY HER OWN TESTIMONY CARRIED HER UNDER THE BATTERIES OF SAN JUAN.

It appears from the log of the *Olinde Rodrigues*, page 32 (left-hand page), that from 4 a. m. her course, which was previously *S. 69 E.*, was changed to *S. 73 E.*, and on this S. 73 E. course from 4 a. m. the log claims they would pass "off San Juan" "8½ miles" (see right-hand page 32, log *Olinde Rodrigues*).

This log is not sworn to. It was written up *after* the capture, as the last statement in it was "making prepar-

ation for the whaleboat that cruiser sent to them." The captain, Pherivong, in his testimony and chart attached (fol. 41), showing "*actual* route he was taking at time of capture," makes the last course from 4 a. m. to time of capture, 8.10, *S. 69 E.*, i. e. that they *did not* change the course at 4.30 a. m., but continued *S. 69 E.*, which they had been running since midnight. The captain's oath contradicts the written log. The difference between *S. 69 E.* and *S. 73 E.* is 4 degrees. The course *S. 73 E.* from 4.30 a. m. by log would bring them 8½ miles off San Juan. The course which they "actually took," *S. 69 E.*, would bring them so much nearer to San Juan as the deviation is 4 degrees in 40 miles, the distance traveled by the *Olinde Rodrigues* according to her log since 4.30 a. m. (Three hours and 40 minutes at 10½ knots an hour.)

This deviation is at least 4 or 5 miles (see diagram) and, on the *S. 69 E.* course, the "actual route" sworn to by Captain Pherivong, the *Olinde Rodrigues* would arrive off San Juan 4 or 5 miles nearer than by the *S. 73 E.* course; i. e., about 3 or 4 miles from Morro; that is, under the *protection of the batteries*, which had a range of 6½ miles. (See testimony of Emory and Burns, Record, fol. 248, 262.)



This diagram shows a deviation of four degrees measured on compass (S. 73 E. and S. 69 E.). If C D be distance traveled and be 40 miles (from 4.30 a. m. to

8.15 a. m. at 10½ knots an hour), the deviation would be A D, which is about one-tenth of the distance traveled, or four miles at least.

This last course of the *Olinde Rodrigues* and the contradiction between Captain Pherivong's oath and the log is of the gist and marrow of this question.

The captain's oath shews the log fabricated, written as it was after capture, so as to make it appear that the course when charted *as by log* from Puerto Plata would pass 8½ miles from San Juan. To do this they inserted a *S. 73 E.* course, a more easterly course from 4 a. m. instead of the more southerly course *S. 69 E.*, "actual route," well knowing that S. 69 E. course from point of departure at 4.30 a. m. would, when laid off on chart, bring the *Olinde Rodrigues*, in about 3 or 4 miles off San Juan, under the guns of Morro and shore batteries. This fabrication was an endeavor to escape this fact and its consequences.

At the time of capture their course was concealed from the prize master and they acted suspiciously.

Lieutenant Russell, of the *New Orleans*, says that they acted in a peculiar manner about the log and course; they had *two* courses, and did not deliver the log book (journal de officier), in which courses are recorded, on his first visit and demand, but only three hours afterwards, on his second visit; this was after they had time to write up their log. (Folger, fol. 181, 182; Russell, fol. 191.)

But their own captain gives in his evidence and chart contradiction to the log they wrote up.

This wide-open gap in this case appears also in the questions asked by counsel for the *Olinde Rodrigues* of

Lieutenant Rooney, navigator, in asking him to lay off their courses on the chart. At fol. 328, Mr. Govin, for claimant, asks Navigator Rooney, of the *New Orleans*, to lay "a course *south 69 east* 2½ miles from old French Cape." (This is the captain's course.)

Answer. That would steer you in on the land at Cape San Juan!

Again Mr. Govin corrects the question (fol. 328).

Q. I correct the question by using the course to Cape San Juan. I made a mistake in saying to Culebra Passage, to see the light off Cape San Juan.

A. (Lieutenant Rooney.) It will steer you, if you pass Cape Viejo Frances 2½ miles and steer *south 69 east*, it would run you into the land. It would not give you any clearance there. You would run *into* the land a little to the eastward of *Port San Juan*. You would probably pass *Port San Juan* a mile on that course (fol. 328).

Q. (By Mr. Govin.) That is to say, if you took a *south 69 east* course from about 2½ miles from the old French cape you would pass about a mile from San Juan?

A. About *a mile* from *Port* San Juan, *not* Cape San Juan (p. —).

Q. (By the Court.) Cape San Juan and *Port San Juan* are different points?

A. Cape San Juan is the light. (Rooney, fol. 328.)

It is to be noticed that laying off the course *south 69 east* on the chart brings the *Olinde Rodrigues* a mile from Port San Juan. This is the course Captain Pherivong swore to, *S. 69 E.*

The counsel for claimant, Mr. Govin, immediately flies

this *sworn course* of the *Olinde Rodrigues's master* and its results, and says:

> Mr. GOVIN. I should like the *log* which is in evidence of the French ship. The difference in the names are very slight, but in formulating these questions I have gotten some of the points mixed. Now the *log* shows the course we followed, and I want the lieutenant to verify the course, and the *log* will show it (fol. 328).

And after recess (at fol. 337, Rooney) Mr. Govin resumes the subject:

> Q. (Govin.) Now, Lieutenant, will you please lay out a course as is read to you. "Old French Cape, steam 2 miles distant." * * * "At 5 o'clock in the morning, after an observation, we came back to *south 73 east*, in order not to pass San Juan too near, passing San Juan about 9 miles at 8 o'clock in the morning." (Rooney, fol. 337.)

Here there is substituted for the captain's *sworn* course, *S. 69 E.*, to, that ran into the land, passing off San Juan 1 mile under the batteries, the fabricated, unsworn course of the log, *south 73 east*, that no one swears to, to pass San Juan 9 miles off! The only escape for claimants on their own evidence is, being caught by the captain's sworn course when laid off on the chart, to elude it by the fabricated, unverified log contradicting their master's oath. Such is the bald nakedness of this defense.

By the course they were running, by their own evidence, they were to bring up 1 mile off San Juan, i. e., 5 miles *within* and *inside* of the circle of all the batteries in their 6-mile range of cannon shot! This confirms the positive testimony of the officers of the *New Orleans* and the ob-

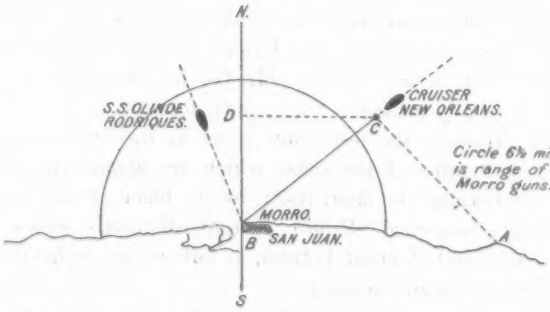
server Lara, at Morro, who testify she was heading for San Juan.

It is clear therefore that by their course, by *their own sworn evidence*, they were running the blockade.

V.

THE POSITION OF THE "NEW ORLEANS" WHEN THE SHOT WAS FIRED AND THE POSITION OF THE "OLINDE RODRIGUES" WHEN THE SHOT WAS FIRED, SHEW CONCLUSIVELY SHE WAS RUNNING THE BLOCKADE.

The position of the "*New Orleans*" when the shot was fired was a little westward of point *C* on Plat A, Rooney's testimony. She was 7⅞ miles from Morro, bearing southwest, and less than 5 miles to the east from north and south line through Morro, and 6 miles offshore.



Lieutenant Rooney testifies (see Plat A, Rooney, frontispiece, fol. 315–319).

The point C, 9 o'clock position of *New Orleans*, is the intersection of cross bearings carefully taken of Morro and Telegas Point at 9 a. m.

The point C is 7⅔ miles from Morro, bearing southwest, and 5 miles from point D, the intersection of a line drawn west with north and south line through Morro. D is 5⅔ miles from Morro. (Plat A, Rooney, frontispiece, fol. 316, 317.)

The point C is a little eastward of the spot where the *New Orleans* fired the shot, for it appears the shot was fired at 8.12 a. m., and the *New Orleans* stopped as soon as steamer headed to and waited for the steamer to come to her (Folger, fol. 159). It was forty-eight minutes between firing of shot at 8.12, and the time of taking the bearings at 9 a. m. (Rooney, fol. 315). In these forty-eight minutes (8.12 to 9 a. m.), the *New Orleans* was drifting eastward (the easterly current prevailing there) to point where bearings were taken at point C at 9 a. m. (Rooney, fol. 322; Folger, fol. 180; Blakeley, fol. 220.

The alleged conflict of this evidence (at fol. 220, Blakeley's testimony) with the United States Government pilot charts, insisted on by Mr. Govin, claimant's counsel, is wholly mistaken on his part, fol. 220.

(1) Because the testimony is as to inshore currents within 8 miles of the coast, which are always *variable*.

(2) Because the chart itself, by the black arrows indicating a *westward* offshore current, distinctly states at the left hand of chart bottom, as follows, in explanation of the colors and symbols:

> *Oceanic currents.*—The *yearly average* set of the stream and drift currents is shown by the small black arrows. (See chart.)

The "small black arrows" pointing westward only indicate the "*yearly average set.*" The *eastward* inshore

current in *July, 1898*, as positively testified by the officers of the *New Orleans*, is not in conflict with this general statement.

(For variation of currents in West Indies, see Navigation of Gulf Mexico and Caribbean Sea, vol. 1, fourth edition; The West India Islands, from United States Bureau of Navigation, Hydrographic Office, Washington, 1898, p. 9.)

Allowing for the turn and short distance the cruiser went to *northeast* (Rooney, fol. 314) and for this drift of forty-eight minutes in the easterly current, the *New Orleans* (having drifted eastward forty-eight minutes) was about 4 miles, more or less, from and *east* of the north and south line through Morro *when she fired the shot* at 8.12 a. m.

This shot was 4½ to 5 miles range (Folger, fol. 163) and fell to about one-half mile ahead of the steamer, and therefore intercepted the *Olinde Rodrigues* directly off of San Juan, a little to the *west* of the north-and-south line through Morro, her masts wide open, steering almost due south, as we have seen by testimony of all officers of the *New Orleans*.

These figures, accurate charting by cross bearings, and current forces testified to by Navigator Rooney of the *New Orleans* as exact, and confirmed by Captain Folger and Blakeley (watch and division officer on the deck), and Lieutenant Russell, and by Ensign Nelson in the military top, all put the *Olinde Rodrigues* a little to the *westward* of the north-and-south line through Morro when the *New Orleans* fired the shot. And this is the exact position she appeared to Observer Lara at Morro

tower, who drew, at the request of the court, a rough sketch of same, attached to his testimony at page 141, fol. 297, by which the *Olinde Rodrigues* was *west* of the north-and-south line heading for Morro when shot was fired.

This is again confirmed by the time it took the *Olinde Rodrigues* to come to the *New Orleans*.

The shot was fired at 8.12.

Lieutenant Rooney came on deck at 8.45 and then the *Olinde Rodrigues* was approaching from the westward on the port bow one-fourth of a mile away (fol. 314). In thirty-three minutes the steamer would make about $5\frac{3}{4}$ knots (her speed being $10\frac{1}{2}$ knots by her log, p. 32) and coming to the *New Orleans* at point C at 9 a. m., $5\frac{1}{15}$ miles from the north and south line through Morro, she must have come from a point a little to *west* of that line.

Captain Folger, judging by his eye, says, "I brought the vessel up directly on the north and south line as indicated on the chart" (fol. 174). Officer Nelson, also judging by the eye, from military top of the cruiser, says, "she was not on north and south line until we hove her to" (fol. 228). In the light of this overwhelming testimony, both of accurate recorded cross bearings taken at the time, at 9 a. m., by skilled navigators and the concurrent testimony of officers and the confirmatory observation of Observer Lara at Morro, the statement of Captain Pherivong of the *Olinde Rodrigues*, without taking any bearings or cross bearings, that he was captured when he had just passed the port of San Juan, "about *7 or 8 miles eastward of the port*" (fol. 79), is worthless, to say the least, and is like his statement that he turned and went to the cruiser as soon as he saw her; the overwhelming testi-

mony being that he continuously and deliberately disobeyed the signal to heave to, and came to only on a shot that revealed him to be under the guns of the cruiser and compelled instant obedience or destruction.

Moreover, the statement of Landgren, second captain of the *Olinde Rodrigues*, as to place of actual capture (i. e., boarding, when vessels came together) is "after having passed the port of San Juan and gone *4 miles* east of it." (See answer to 19 interrogatory, Landgren, second captain *Olinde Rodrigues*, fol. 69.)

The "*4* miles *east* of San Juan" had been run by the *Olinde Rodrigues after* the shot was fired at her 5 miles away when she was just a little to *west* of the north and south line through San Juan, and she turned and came to the *New Orleans*, a distance of about 5 miles, while the *New Orleans* waited for her, watching the Swedish bark to the northeast.

In this testimony the second captain of the *Olinde Rodrigues* flatly contradicts Captain Pherivong and confirms the concurrent and overwhelming evidence of the officers of the cruiser *New Orleans* and the observer, Lara, at Morro, that the *Olinde Rodrigues* was a little to *west* of north and south line through Morro *when the shot was fired;* and that she came eastward to the *New Orleans*, about 5 miles, while the *New Orleans* waited for her, watching the Swedish bark.

It will thus be seen from the position of the *New Orleans* when shot was fired, she being 6 miles offshore and within about 4 to 4½ miles of the north and south line through Morro, that the *Olinde Rodrigues*, coming to her in an *easterly* direction after shot was fired, must have come from a point within 6 miles of Morro; that

is, from a point within range of the batteries of Morro; in other words, she was actually hove to within the blockaded station and within the range of Morro and the shore batteries, and that, after she had continuously defied the signal previously to "stop instantly and heave to," and was only brought to under shot fired.

The cases which we quote *supra* from Sir William Scott, affirmed by our own Supreme Court, make this position and conduct on the part of the *Olinde Rodrigues* each equally a distinct ground of condemnation, and especially after she had been warned officially by United States steamer *Yosemite* off San Juan, by entry in her log on the 5th of July, of the existence of the blockade of San Juan, and when thereafter her duty was to see to it that she put herself in no equivocal position, and always, in the language of Sir William Scott, to *shun that neighborhood;* "FUGE LITUS!"

VI.

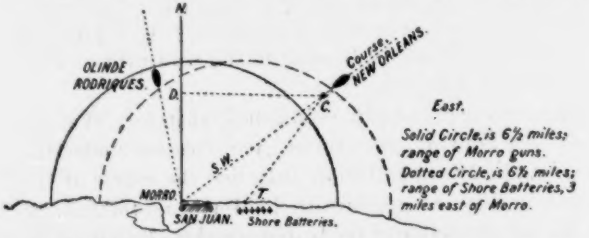
AGAIN, THE "OLINDE RODRIGUES" WAS CONCLUSIVELY VIOLATING THE BLOCKADE, BECAUSE, RUNNING IN UNDER PROTECTION OF MORRO BATTERIES, SHE WAS DRAWING THE CRUISER "NEW ORLEANS," IN PURSUIT OF HER, UNDER THE RANGE OF THE MORRO AND SHORE BATTERIES. THIS OF ITSELF, INDEPENDENT OF HER INTENTIONS, AS A MATTER OF LAW, RAISES "A PRESUMPTION DE JURE" OF HER GUILT AND CONDEMNS HER.

The *New Orleans* had chased her in 6 miles, on a circular course from west one-half south, gradually changing course more and more to southward to head her off and to keep her always on the same bearing, the starboard

bow of the cruiser. (Captain Folger, fol. 160–161, and his chart.) This is the fixed rule in chasing laid down by highest authorities. "The chaser will steer a course slightly converging to that steered by the chase. * * * By constantly keeping the chase *on the same bearing* the chaser will attain the chase in the shortest possible time and by the shortest route." This is "the rule in chasing to leeward or in chasing under steam." (Luce's Seamanship, pp. 563, 564. Used in U. S. Naval Academy and quoted as standard authority by the Supreme Court of the United States.)

Finally, on this circular course, the *New Orleans* fired the shot near the point C (Folger, fol. 158), the *New Orleans* then heading for Morro on a course *southwest*, and having the *Olinde Rodrigues* on her *starboard bow* to the westward 5 miles away.

By Rooney's testimony and chart, made on careful observations by cross bearings, the *New Orleans* was at 9



a. m. at C, having (while waiting for the *Olinde Rodrigues*) drifted a little eastward from spot she fired shot at 8.12 a. m.

This point C is $7\frac{2}{3}$ miles from Morro, bearing southwest, and is about 6 miles ($5\frac{2}{3}$) from shore.

The *New Orleans*, when she fired the shot on this course heading *southwest* for Morro, $7\frac{2}{3}$ miles away—

(1) Was within $1\frac{1}{6}$ miles of the extreme range of the guns of Morro ($7\frac{2}{3}—6\frac{1}{2}$, range of batteries, equals $1\frac{1}{6}$).

(2) Was nearer than $7\frac{2}{3}$ miles to the shore batteries to the *east* of Morro for 3 miles, and probably then within their extreme range ($6\frac{1}{2}$ miles).

(3) At a speed then attained the *New Orleans* would in *four minutes* ($1\frac{1}{6}$ miles) be under the guns of Morro.

(4) At any moment the shore batteries 3 miles *east* of Morro might open fire on her.

She was on the verge of the range of the batteries. To chase farther was to draw under the guns and risk fire of the enemy.

As Captain Folger says—

> Remembering the Morro, I had to keep away from, fearing they were going to fire (fol. 176).
>
> I was finally heading direct for Morro before the moment arrived at which I considered her within the range of my guns. (Folger, fol. 161.) I fired at him 5 miles away, bearing to the westward. (Folger, fol. 175.)

It is overwhelmingly established, therefore, that the chase was drawing the cruiser *New Orleans* under the guns of the Morro and shore batteries, the course of the *Olinde Rodrigues* being directly to Morro and then almost under the protection of the batteries and necessitating the cruiser pursuing (keeping her on starboard bow, "always same bearing") to pass within the range of the enemy's guns.

These shore batteries and Morro were manned and watching to protect the vessel running the blockade, and

engaged the American warship. (See testimony of Emory, Burns, and Lara.)

It was under these circumstances, the *Olinde Rodrigues* having defied the signal and run on toward Morro, Captain Folger turned and said to his officer, "I fear we have lost him; he will get in before we can stop him." "At that time we were preparing to fire." (Folger, fol. 158.)

The range of the Morro and shore batteries was 6½ miles, and the shore batteries extended *3* miles *east* of Morro, by the following evidence:

RANGE OF MORRO AND SHORE BATTERIES.

Emory, of *Yosemite* (fol. 248): At least 6½ *miles*—6½ miles, from experience. Burns, of *Yosemite* (fol. 262), testifies: "Range, 6½ miles of Morro guns." Lara, observer at Morro (fol. 277), testifies: Prepared and instructed at Morro and other batteries to protect any vessel entering. Artillerymen slept next to the loaded guns. Captain Folger (fol. 162): Range of batteries of Morro, *6 miles*, to my knowledge.

These facts make a clear case of a violation of the blockade of San Juan "a presumption *de jure*." The authorities are full to the point.

In the *Gute Erwartung* (6 Rob., 182):

> This was a case of a Lubec ship that had come from Oporto, with an *asserted destination* to Caen, but was captured *20 miles* to the northwest of that port, and about the same distance from Havre.

Sir William Scott says:

> This is a case of a ship that is *asserted to have been bound to Caen*, and to have been proceeding

toward Havre in quest of a pilot to carry her to the port of destination. * * *

But there is an ulterior circumstance which presents a more unfavorable aspect. In the former case the vessel had continued her course close under the batteries, and was cut out at some *considerable risk and danger to the blockading vessel.* In that case there was an illegal intention pursued to an illegal act; for a neutral vessel can not be permitted so far to interfere with the exercise of a blockade as to expose the force maintaining it to the annoyance of the enemy's guns. In the present instance the vessel was at a distance of near 20 miles; but the unfavorable circumstance to which I allude places her, in construction of law, in the same situation which the other vessel had actually reached. For the master says "that the course in which he was steering would have carried him directly to Havre, and that he should have continued in that course, though *not into the port of Havre;* but that he should have gone close under the land and have taken a pilot for Caen." Here, then, we perceive the same intention and in the course of being pursued to the same illegal effect. *How can this intention be considered as innocent? It had not been carried so far as in the other case,* I acknowledge; but only because the vessel was interrupted before she had arrived at the spot where the other ship was actually taken. It is impossible that any blockade can be maintained if such a practice is allowed, that a vessel under a destination to a port not interdicted shall be at liberty to pursue her course in such a manner as must draw the cruiser employed in that service under the range of the enemy's batteries. It is at all times matter of regret that the property of innocent persons should be exposed to hazard by the mere imprudence of their master;

but it is *impossible to relax the principle* that the employer is legally affected by the acts of his agent. I am of opinion that the master in this case had declared an unlawful purpose, and was employed in pursuing it to an unlawful act, and that the ship and cargo must be pronounced subject to condemnation. (*Gute Erwartung*, Id., 183–184.)

So again Sir William Scott says:

But all the general consequences of such a blockade must be supposed to have been duly considered by the government imposing it, and when the measure is once applied, the court is under the necessity of enforcing it, on the only principles on which any other blockade ever has been or can be established. Were the court disposed to desert those principles, and to wander into new speculations respecting blockades, I do not observe that the gentlemen have even suggested the new principles on which it could act. The court is therefore under the necessity of applying the same general principles on which all former decisions on this right of war have been founded. * * *

The neutral merchant is not to speculate on the greater or less probability of the termination of the blockade, to send his vessels to the very mouth of the river and say, If you do not meet with the blockading force, enter; if you do, ask a warning and proceed elsewhere. Who does not at once perceive the frauds to which such a rule would be introductory? The true rule is that after the knowledge of an existing blockade you are not to go to the very station of blockade under pretense of inquiry. * * *

But in no case was it held that they might sail to the mouth of a blockaded port to inquire whether a blockade, of which they had received previous formal notice, was still in existence or not. If particu-

lar parties are innocent in their intention, it is still a measure of necessary caution, and of *preventive legal policy*, to hold the rule general against the liberty of inquiring at the very mouth of the blockading port, which would amount in practice to a universal license to attempt to enter, and on being prevented, to claim the liberty of going elsewhere. It is next contended that the master, on being brought to, said that he was not going to a blockaded port, but that he would go, in obedience to his instructions, to a port in Norway, and therefore that the claimant is entitled to the benefit of a deviation. But this comes too late; he was taken in act of going toward the blockaded port. The act is, in my opinion, to be taken as completed by the attempt. If the owners are innocent, they must, in law, be bound by the indiscretion of their agent. But this is not a case of persons suffering merely by the misconduct of their agents. The owners here are directly implicated by the instructions which they themselves have given. It may fall hardly upon them, but I feel myself obliged to pronounce that there would be no principle upon which a blockade could be forced if such excuses as these were to be admitted, and that these vessels are subject to condemnation. (*Spes and Irene*, 5 Rob., 76, 78–81.)

In the *Neutralitet* (6 Rob., 30, 35), Sir William Scott says:

> It will not be necessary in the present case to lay down a general principle on this point, but I am disposed to agree to a position advanced in argument that a belligerent is not called upon to admit that neutral ships can innocently place themselves in a situation where they may with impunity break the blockade whenever they please. If the belligerent country has a right to impose a blockade, it

must be justified in the necessary means of enforcing that right, and if a vessel could, under the pretense of going farther, approach cy près close up to the blockaded port, so as to be enabled to slip in without obstruction, it would be impossible that any blockade could be maintained. It would, I think, be no unfair rule of evidence to hold as a presumption de jure that she goes there with an intention of breaking the blockade, and if such an inference may possibly operate with severity in particular cases, where the parties are innocent in their intentions, it is a severity necessarily connected with the rules of evidence and essential to the effectual exercise of this right of war.

In the *Newfoundland* (89 F. R., 510), the district court of South Carolina (1898), quoting and applying these words of Sir William Scott in that case, said further (pp. 519, 520):

> It must be conceded that there is no proof of any attempt to enter the port of Havana; that is to say, no witness has testified to seeing her heading that way. It must also be admitted that the testimony as to loitering falls very far short of the proof offered in the *Neutralitet* (6 C. Rob. Adm., 30), the *Appollo* (3 C. Rob. Adm., 308), the *Charlotte Christine* (6 C. Rob. Adm., 101), the *Gute Erwartung* (id., 182), the cases relied on by the Government. All of these cases arose before the days of steam power, but the principles upon which they rest, and which I hold to be sound principles, require their application to conditions now prevailing, when the use of steam power renders the eluding blockades a far more facile undertaking; and I feel compelled to hold that the whole purpose of a blockade would be rendered nugatory if a steam vessel is allowed, after notice, to approach in the nighttime so near to a

blockaded port as to be able to see signals from the shore, and to watch for the opportunity of entering if it should appear that the coast is clear, or the vigilance of the belligerent cruisers is for the time relaxed. A ship so approaching lays herself under the unavoidable imputation of being engaged in an attempt to break the blockade, and there is a necessary presumption of sinister motive which must be rebutted by positive proof that her presence there is innocent, that she is there either from some necessity, or in the course of a voyage which *requires her* to pass that way. I feel bound to hold that the weight of the testimony is on the side of the Government in fixing her position at 6 o'clock at a point from 5 to 8 miles from the nearest shore, and not, as fixed by her officers, at a point about 14 miles from the shore; for why should the mate of the *Tecumseh* have warned them to keep off farther from the shore—a warning which they admit having received—if they were where they claimed to have been, far beyond the reach of any shells against which the warning was given? For this and for the reasons already stated I must conclude that she was at that point at 6 o'clock, and that at 8.30 she was at a point not more than 10 miles distant and not more than 10 miles from Havana light, just outside the cruising grounds of the blockading fleet, from which she could readily see whether it was safe for her to attempt to enter. Having denied that she was there, and having failed to sustain that denial by adequate proof, and having failed to give a satisfactory account of her being in that neighborhood at at all, I am compelled to condemn both ship and cargo.

The facts of this case are very much stronger than the *New Foundland*, for within *three minutes both* steamer and

cruiser would have, on *their courses*, run under the guns of the batteries, in actual chase, after a defiance by the *Olinde Rodrigues* of the cruiser's signal, the shot within range alone finally ending the chase, when the *Olinde Rodrigues* then first realized her destruction as certain unless she hove to.

VII.

THE MOTIVE FOR RUNNING BLOCKADE BY THE "OLINDE RODRIGUES" IS ALSO CLEAR AND ADEQUATE.

The difference between intent and motive is that in all criminal cases intent, the act of the will, must appear; motive, that which moves the will, may be and remains often undetermined.

In this case we have proven both the intent to violate the blockade and the intent being actually executed. This is sufficient in itself.

The motives also in this case are all apparent, though the district judge seems to think it inconceivable. They are as follows:

A. The master had the instructions of his principal after notification of blockade on the 5th of July by entry in log, to run the blockade on July 17. This appears from his own testimony, for he swears and the purser swears—

(1) The *agent* of his company (Captain Pherivong, fol. 87, his additional testimony) at Cape Haytien on *July 13* furnished him with (*a*) bill of health and (*b*) manifest of no cargo for San Juan at *same time* the agent of company furnished him with bill of health from French con-

sul, destination Havre; and bill of health from Danish consul, destination St. Thomas," which are in evidence.

The *agent of the company* therefore gave him papers for *three* destinations, San Juan, St. Thomas, and Havre. (See testimony of Purser Darondeau, fol. 37, and Captain Pherivong, fol. 87.)

(2) Again this was repeated a second time at Port au Prince July 14, by "the *agent* of the company" giving him (*a*) bill of health and (*b*) manifest for San Juan. (See testimony Purser Darondeau, fol. 37, and Captain Pherivong, fol. 87.)

(3) Again *agent of the company* at San Juan (knowing of the blockade) cables to him to Cape Haytien, July 13, (*a*) that he must stop at San Juan; (*b*) that he *would have* to take fifty first-class passengers. (See testimony purser, fol. 37, and captain, fol. 87.)

It thus appears that there was a concurrence of instruction of "*agents of the company*" to him to go to San Juan, and the "agents of the company" and the Spanish consuls at the respective ports furnished him with bills of health and manifests for San Juan as a port of destination. In preparation, means, instruction, and object in view, the *agents of the claimant company* therefore concurred and combined to have the *Olinde Rodrigues* run the blockade.

B. The particular motive and object, as far as it has transpired, was to take *fifty first-class passengers* fleeing from San Juan. Why the steamer would run the risk is also clear.

(1) Because they thought they could elude or outrun the *Yosemite*, under their former experience, and evidently

mistook at first the cruiser *New Orleans* for the *Yosemite*, ignorant of her great speed, 22 knots, and long range of her guns. The *New Orleans* was a tremendous surprise. The speed of the *New Orleans* was the first question asked of Prize Master Russell by purser on boarding her (fol. 182). That was what caught them.

(2) Because fifty first-class passengers at that particular time, fleeing with their treasure through that blockade, meant any passage money the *Olinde Rodrigues* might ask, from $1,000 upward. Again, they might be taking Spanish officials, Spanish archives and records, and Spanish official treasure, all to be saved from the then certain impending storm of the American advance "on to Porto Rico."

Let us recall the facts of history, of which the court will take judicial notice, as they existed on July 17, 1898.

(1) The port was blockaded; there was no escape from the island; San Juan was its capital. No other chance offered for escape by steam vessel.

(2) San Juan was bombarded suddenly in May by Sampson's fleet, and the city was shuddering now before another siege and certain capture.

(3) Cervera's fleet had been destroyed July 3, and Spain's power in the Antilles doomed.

(4) Santiago, after short investment by land, had just fallen, a sign that all resistance was vain.

(5) The cry from America was, "On to Porto Rico!" (not to Havana, because of its then unhealthy climate); the United States wishing to be immediately in possession of Porto Rico. San Juan expected to be next invested.

(6) The horrors of American invasion as depicted to the Spanish mind, as witness the proclamations of the Spanish military governors of Cuba, Porto Rico, and Philippines, declaring—

(*a*) To soldiers, that Americans would kill them, even after taking them prisoners.

(*b*) To women, that they would be dishonored.

(*c*) To citizens, that they would loot them of all treasure.

(7) There were also Spanish official records and official treasure to be also secured and removed at any price.

(8) This steamer, due July 17 on eastward voyage, was the sole escape. There were also instructions to look out for her from governor's palace in San Juan, showing the expected aid.

(9) The captain of the steamer had nothing to lose. He was under the instructions of agents of the company from three ports. He boasted of forcing the blockade. He had everything to gain—dash, glory, fame—if he succeeded, perquisites untold, and perhaps fortune, from the "fifty first-class passengers" he might rescue before the imminent storm of war soon to break on them in ruin and pillage, as they feared.

All such blockade running is "paraded as a triumphant achievement" says Upton (Maritime Prize and War, page 289), and the personal vanity of the captain was also appealed to, in addition to his pocket.

In the light of these considerations there was therefore the usual motive of profit and gain, and in this case of untold profit for the steamer, exceeding possibly the

whole year's business. In addition we have seen there were other apparent strong motives.

In this connection we refer to the recent case of the steamship *The Adula* (89 Fed. Rep., 351), just decided, where the *motive* actually alleged and pleaded as an excuse of blockade running by the steamship was that she was going to take away refugees from Guantanamo, Cuba; but the court condemned her on principle and authority.

EFFECTIVENESS OF SAN JUAN BLOCKADE.

The following assignments of error, from 1 to 14, set forth the view contended for by the United States bearing on the question whether the blockade of San Juan was an "effective blockade" on July 17, 1898, and capture of the *Olinde Rodrigues* a lawful capture.

EFFECTIVE BLOCKADE.

1. The district court erred in decreeing a restitution of the steamship *Olinde Rodrigues* to the claimant on the ground that the blockade of San Juan was not an "effective blockade" on the 17th of July, 1898, at the time of the capture of the said steamship by the United States cruiser *New Orleans*, while attempting to enter the port of San Juan.

2. The district court erred in not holding and decreeing that the blockade of San Juan on the 17th of July, 1898, was an effective blockade, and that the steamship *Olinde Rodrigues* was captured while attempting to break the blockade of San Juan on the 17th of July, 1898, and in not decreeing the condemnation of the steamship *Olinde Rodrigues* as a lawful prize of war.

3. The district court erred in finding "that the cruiser *St. Paul*, a vessel of great speed, had been upon that station long before the proclamation of the blockade, and though not comparable in armament with the *New Orleans*, she was equally efficient for blockading purposes, and the *Yosemite* was but little less so, from which it is fairly deducible that the proclamation of the blockade did not induce the sending thither of any force to make it effective, and that the single cruiser upon that station, from a date long anterior to the proclamation, had other duties and was intended for other purposes than merely to maintain a blockade."

4. The district court erred in holding and finding that only "through an error of judgment the master of the *Olinde Rodrigues* concluded that there was no effective blockade of the port (of San Juan) and attempted to go into the port" on the 17th of July, 1898.

5. The district court erred in holding "that there was not an effective blockade of the port of San Juan within the spirit and intent of the law of nations" on the 17th of July, 1898.

6. The district court erred in holding "that there would have been no attempt to enter if such (effective) blockade had existed at San Juan."

7. The district court erred in not holding that the blockade of San Juan on the 17th of July, 1898, was an actual and effective blockade within the meaning of the proclamation of the President of the United States dated the 27th day of June, 1898.

8. The district court erred in not holding and finding specifically as fact that the actual capture of the steam-

ship *Olinde Rodrigues* was made by the United States cruiser *New Orleans* on the 17th of July, 1898, while heading for San Juan and attempting to enter the port of San Juan, after being duly and actually notified of the blockade of San Juan and warned off of the port of San Juan on the 5th of July, 1898, by entry in her log, by the United States steamship *Yosemite*, and after warning and signal to stop by the United States cruiser *New Orleans* on the morning of the 17th of July, 1898, and while defying and disobeying both such repeated warnings and signals.

9. The district court erred in not holding that the fact of the capture of the steamship *Olinde Rodrigues* while attempting, on the 17th of July, 1898, to enter San Juan, after warning on the 5th of July, 1898, by entry in her log, by the United States ship *Yosemite*, was a conclusive demonstration that the blokade of San Juan was an "effective blockade."

10. The district court erred in not holding that an "effective blockade" was a blockade practically effective, and that the actual capture of the steamship *Olinde Rodrigues* on the 17th of July, 1898, by the United States cruiser *New Orleans*, while attempting to enter the port of San Juan, after having been warned off San Juan on the 5th of July, 1898, by the United States steamship *Yosemite*, and after warning and signal to stop by the United States cruiser *New Orleans* on the morning of the 17th of July, 1898, and while disobeying and defying these repeated warnings and signal, was a demonstration that the blockade of San Juan was practically effective.

11. The district court erred in holding that it was as matter of fact not manifestly dangerous for the *Olinde Rodrigues* to attempt to enter San Juan on the 17th of July, 1898, when she was captured by the United States cruiser *New Orleans*, after a warning, entered in her log, by the United States steamship *Yosemite* on the 5th of July, 1898, and after the warning and signal to "heave to and stop" of the United States cruiser *New Orleans* on the morning of the 17th of July, 1898, both of which warnings and signal were disobeyed and defied by the steamship *Olinde Rodrigues*, and when disobeying and defying such repeated warnings the *Olinde Rodrigues* was actually captured.

12. The district court erred in holding that "a blockade fleet," "a number of vessels," "arc of circumvallation"—some or all of these conditions must exist to make a blockade effective.

13. The district court erred in holding that one war ship of type, speed, armament, and range of guns of the United States cruiser *New Orleans*, that is, an armored modern cruiser, of 22 knots speed, 32 guns, and 6½-mile range of guns, shooting rifle shells, was not in fact an effective blockade of the port of San Juan, with its single entrance, on the 17th of July, 1898.

14. The district court erred in holding that it "requires, as matter of law, more than one modern war ship of the type, speed, armament, and range of guns of the United States cruiser *New Orleans*, that is, a modern armored cruiser, of 22 knots of speed, 32 guns, and 6½-mile range of guns, shooting rifle shells, to blockade San Juan, a port of a single entrance."

THE FACTS AS TO THE BLOCKADING FORCE AT SAN JUAN.

The blockade of San Juan was not proclaimed by the President until the 27th of June, 1898.

The language of the proclamation is as follows:

> * * * The United States of America has instituted, and will maintain, an effective blockade of all the ports on the south coast of Cuba from Cape Frances to Cape Cruz, inclusive, and also the port of San Juan in the island of Porto Rico.

The blockade was not of *the coast* of Porto Rico, but only of the *port of San Juan*, a small town of about 20,000 inhabitants, on the northern coast of Porto Rico, with a single entrance. (See chart A, Porto Rico.)

For the first seventeen days of the blockade, i. e., from June 27 until the 14th day of July, 1898, the blockading vessel was the United States steamer *Yosemite*, formerly the merchant steamer *El Sud*, of the Morgan Line, which had been temporarily made an auxiliary cruiser, with rapid-firing guns and 6-pounders, all of very small range of 3½ miles, the *Yosemite* having a maximum speed of 15½ knots. (Emory, fol. 240, 241, 244.)

During the time the *Yosemite* was blockading the port she ran the armed transport *Antonio Lopez* ashore 6 miles from San Juan (Emory, fol. 248) and gave a number of neutral vessels official notice of the existing blockade, warning off a number from the port, and actually wrote into the log of the *Olinde Rodrigues*, off San Juan, the official warning of blockade of San Juan on the 5th of July, 1898. (Burns, fol. 261, 263; log, fol. 93.)

On the 14th day of July, 1898, the United States armored cruiser *New Orleans*, the fastest vessel in the United States Navy and the most recently built, with a maximum speed of 22 knots, and with a full armament of rifle guns at long range of 5½ sea miles or 6½ geographical miles, firing explosive shells, was sent to take the place of the converted cruiser *Yosemite*. This assignment of the *New Orleans* to the blockade of San Juan was vastly strengthening it, and more than quadrupling its effectiveness by reason of her great speed and range of guns. The *New Orleans* was continuously on the blockade station, blockading the port of San Juan from the 14th of July until the time of the capture by her of the *Olinde Rodrigues* at 8.12 a. m. on the morning of Sunday, July 17, 1898. It does not appear that any vessel succeeded in running the blockade while the *New Orleans* was blockading San Juan; nor does it appear that the French Government or any other neutral power ever gave notice or warning or complained in any way that the blockade of San Juan was not an effective blockade.

It appears by the testimony of Lieutenant Rooney, fol. 322, navigator of the United States cruiser *New Orleans*, and by the Chart A, accompanying his testimony, in evidence, that the cruiser *New Orleans* was constantly in motion in front of Port San Juan, directly off the port, "between 6 and 7 miles from Morro;" that on the morning of the capture, the 17th of July, she was, at 4.50 a. m., to the north and west of the port, about 10 miles off shore; that she went east, and at 5.15 a. m. was due

north of Morro. At 6.50 she was to the northeast of Morro, after having gone east; that at 7.50 she had come south 3 miles, and was to the northeast of Morro watching a Swedish bark that was hovering; that from this point she saw the *Olinde Rodrigues* to the north and west of San Juan and chased her until the *New Orleans* reached a point C on Rooney's Chart A, about $7\frac{2}{3}$ miles to the northeast of Morro and 6 miles off shore, where she fired the shell at the *Olinde Rodrigues*, about 5 miles to westward, then attempting to enter San Juan, being north and west of San Juan, about the same distance off shore and heading directly in for San Juan.

This evidence is also confirmed by the concurrent testimony of Captain Folger, Lieutenant Rooney, Nelson, officer of the deck, Ensign Blakeley, and others, of the United States cruiser *New Orleans*, and by the telegraphic observer, Lara, then in the tower of Morro Castle, San Juan.

It is true that the master of the *Olinde Rodrigues* says that as soon as he saw the cruiser *New Orleans* he came toward her, but the log of the *Olinde Rodrigues* shows he ran 20 minutes after he saw the cruiser before he turned toward her, and the testimony of all the officers and observers on the *New Orleans* is to the effect that he did not come to the cruiser *New Orleans* as soon as he saw her, but on the contrary continuously defied the signal to "stop instantly and heave to," and continued on his course until after the shot was fired, and this testimony is confirmed by the steward of the *Olinde Rodrigues*, Girny, and Telegraphic Observer Lara, in Morro, who

testified that she did not change her course and go to the *New Orleans* until after the shot was fired.

The testimony also shows that the United States cruiser *New Orleans* has guns with a range of 5½ sea miles or 6½ geographical miles, firing explosive rifle shells, the most destructive of missiles, in addition to solid shot, and that the first shell fell in front of the *Olinde Rodrigues*, and that they were loading and preparing to fire again when the *Olinde Rodrigues* turned and came toward the cruiser.

(For full detailed statement of the evidence on these points see propositions two, three, four, five, and six under first main head of this brief on "VIOLATION OF BLOCKADE" supra.)

The positions taken by the United States in the fourteen assignments of error (1 to 14) on the effectiveness of the blockade are summed up in the following six propositions:

I.

TO CONSTITUTE AN "EFFECTIVE BLOCKADE" OF SAN JUAN IT IS ONLY NECESSARY THAT THERE SHOULD BE A NOTIFICATION OF BLOCKADE AND AN ACTUAL FORCE PRESENT RENDERING INGRESS OR EGRESS TO THE PORT DANGEROUS.

EFFECTIVE BLOCKADE (LAW).

(1) We submit that an "effective blockade" under the treaty of Paris and the proclamation of the President is a blockade—

(*a*) When the blockade is known.

(*b*) Where there is present an actual blockading force.

(c) Where there is danger to those attempting to break it.

These elements are all that are necessary under the consensus of opinion in modern international law, especially that of England, America, and Germany.

The declaration of Paris (1856) was to correct the abuse of the early part of the century of the so-called paper blockades, or cabinet blockades, where *extensive coasts* were put under blockade by proclamation, without the presence of any force or an inadequate force, which subjected neutrals innocently departing and entering (no force being present) to capture 100 miles or more away from the port during same voyage.

The following authorities fully illustrate this position, for the law of blockade is very rigorous:

> A vessel which has succeeded in effecting a breach of blockade is not exonorated by her success from the consequences of her illegal act. If a ship that has broken a blockade is taken in any part of the same voyage, she is taken *in delicto*. The offense is not terminated until she reaches the end of the voyage, and the voyage is understood to include her return. (Hall's Int. Law, 736.)

Woolsey Int. Law, page 351:

> It is for this reason that a neutral should know of the blockade, and that it should be enforced at the port by an adequate force, else neutrals might be deceived into coming out or going in, and afterwards, before the voyage is over, incur the penalty of seizure and confiscation for an offense not knowingly committed.

As an illustration of this paper blockade, "France declared the British Isles to be in a state of blockade at a

time when she dared not send a single squadron out to sea for fear of capture by the victorious British navy." (Note Manning's Law of Nations (Amos ed.), Bk. V, ch. X.)

Lawrence International Law, page 577 (Cambridge, 1895):

> In such a case it would be manifestly unjust to seize, 500 miles away from Liverpool, at the end of her voyage, a ship that against that mere proclamation had left Liverpool, where no French ship was or had been blockading the port.

It was against such blockades that the declaration of Paris was directed, and it now has a clear and well-settled meaning in English and American jurisprudence. But never in the history of international law has any vessel attempted to plead that the blockade was not *effective* when as a matter of fact she was actually captured by the cruiser in attempting to enter a blockaded port after warning *previously* entered in her log by a cruiser at that port of the blockade; and this is the case at bar.

In Snow's International Law, page 153 (Washington, Government Printing Office, 1898), the principle is thus stated:

> What constitutes an effective blockade? Halleck says:
>
> "It is now a well-settled principle of international jurisprudence that a lawful maritime blockade of a port requires the actual presence of the blockading force. A mere proclamation of notification of one belligerent that such a port of the other belligerent will be blockaded at such time, and thus

> closed to neutral commerce, is not sufficient to constitute a legal blockade; the force must be actually present at the entrance to the port, or sufficiently near to prevent communication. Nor is the mere presence of the hostile force sufficient of itself to make the blockade a legal one; it must not only be actually present, but it must be large enough to prevent communication, or, at least, *to render it dangerous* to attempt to enter the port."

In Wheaton's International Law, third English edition, page 673, it is said, referring to the fourth article of the Declaration of Paris:

> This merely puts into a formula what was already a principle of the law of nations, but it leaves the often-disputed question of what is a "sufficient force" in the same state as before. This is in reality more a question of fact than of law, and it seems almost impossible to lay down any precise rule defining in all cases what is a sufficient force.

Admiral Dahlgren says in his Maritime International Law (Boston, 1877), page 44, after stating the rule of the armed neutrality of 1780:

> In a debate in Parliament Lord Granville said the force on the spot must be sufficient "to make it very difficult for vessels to obtain egress and ingress." The prime minister (Lord Russell) thought that "evident danger of entering or leaving" constituted an effective blockade. The French minister of commerce (Rouher) says an effective blockade must "prevent approach without exposure to a certain danger." Lord Brougham is more precise; blockade "to be effective, not necessary to render access impossible, but sufficient that it pre-

clude the existence of any reasonable chance of entrance."

(P. 49.) The treaty with Haiti was by Mr. Lincoln's Administration, in 1864, and therefore expresses the views of the United States, after experience in the rebellion, and may be summed thus:

First. Declines to define blockade at all. * * *

The omission of the definition of what constitutes blockade exhibits a tendency to decline acceding to the ample concessions formerly made to neutrals, and to sustain the belligerent rights more strongly than the prevailing fashion, thus inclining to the British decisions. And our prize courts showed a like tendency. * * * Not that the United States ever contemplated recourse to blockades not effective, but that they would not commit themselves to more than plain right required; perhaps a clearer perception of what the interests of the country might require.

The actual force necessary to maintain an effective blockade varies with the circumstances. A treaty between France and Denmark, concluded in 1742, required that the entrance of a port should be closed by at least two vessels, or by a battery on shore. A later treaty between Holland and the Two Sicilies required the presence of at least six vessels at the distance of a little more than gunshot from the port, or the existence of batteries on shore, so placed that entry could not be made, except by passing under the guns of the besieger.

The declaration of Paris, in 1856, prescribed:

Blockades to be obligatory are to be effective—that is to say, maintained by a sufficient force to shut out the access of the enemy's ships, and other vessels in reality.

The United States has practically become a party to this declaration, but have, in the instructions issued during the war with Spain, adopted a more satisfactory definition of an effective blockade. This definition reads as follows:

> 2. A blockade to be effective and binding must be maintained by a force sufficient to render ingress to or egress from the port *dangerous*.

Hall says further on this subject:

> Provided that access is in fact interdicted, the distance at which the blockading force may be sustained from the closed port is immaterial. Thus Buenos Ayres has been considered to be effectually blockaded by vessels stationed in the neighborhood of Montevideo; and during the Russian war in 1854 the blockade of Riga was maintained at a distance of 120 miles from the town by *a ship* in the Lyser Ort, a channel 3 miles wide, which forms the only navigable entrance to the gulf. (Hall, Int. Law, p. 726.)
>
> A blockade whose establishment has been regularly notified to neutral governments must be presumed to continue until notification is given by the blockading government of a discontinuance, unless clear proof to the contrary can be shown.

Professor Snow's work is the authority recognized and acted on by the Navy Department of the United States, under whose direction this volume has been recently published.

It is sustained by principle and authority.

Speaking of the Declaration of Paris, Professor Walker, of Cambridge, England, writes:

> This broad principle is, by reason of its very generality, better suited than mere detailed rules as to

the condition of maritime warfare to-day. (Walker, Science Internat. Law, 1893, pp. 517, 518.)

To the same effect is Hall's International Law:

SEC. 260. The doctrine with regard to the proper maintenance of a blockade, which has been laid down by the *English and American* courts, which is approved of by English and American writers, and which is embodied in the *policy of both countries*, requires that a place shall be "watched by a force sufficient to render the egress and ingress *dangerous*."

NOTE.—The Franciska, Spinks, 115; Phillimore, iii, sec. ccxciii–ccxciv; Bernard, 245; Kent, Lect. vii; Wheaton, pt. iv, chap. iii, sec. 28; Mr. Mason's instructions to the naval forces of the United States, 1846, quoted by Ortolan, ii, 343. Among continental publicists M. Bluntschli accepts and repeats the English doctrine, sec. 829. (Hall's Int. Law (1895), sec. 260, pp. 725–726.)

It is impossible to fix with any accuracy the amount of danger in entry which is necessary to preserve the validity of a blockade. It is for the prize courts of the belligerent to decide whether in a given instance a *vessel captured* for its breach *had reason to suppose it to be nonexistent*. (Idem, p. 726.)

In case at bar the *Olinde Rodrigues* had actual warning entered on her log on July 5, and saw and defied the cruiser *New Orleans* at the time of capture on July 17.

This view of the maintenance of blockade may be questioned on the Continent, but it is the policy and practice of England, Germany, and America since declaration of Paris.

Hall, in referring to this, says (Hall's International Law, p. 728):

The opinions held by the majority of modern continental writers as to the conditions under which

a blockade is efficiently maintained differ in several important respects from the principles which guide the practice of England and the United States. They may perhaps be summarized as follows: The immediate entrance to a port must be guarded by stationary vessels in such number as either to render entrance impossible, or at least to expose any ships running in to cross fire from the guns of two of them. Any accidental circumstance which makes it temporarily possible to go in puts an end to the blockade, and justifies a vessel in attempting to enter. As for three-quarters of a century by far the most extensive experience in blockades has fallen to the share of England and the United States, these opinions, whatever their abstract merits, labor under the disadvantage of being inconsistent with the most authoritative usage upon the subject. They are also much more rigid than the principles embodied in the declaration of Paris and accepted by the great majority of civilized nations. It is hardly necessary, therefore, to inquire upon what ground they are stated to represent existing law. The signatory powers of the declaration of Paris, which is perfectly in harmony with English doctrine, were satisfied with declaring that "blockades in order to be binding must be effective—that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy."

It may be remarked, apart from reference to existing law, and apart also from all question whether blockades ought to be permitted at every place where they are now lawful, that the experience of the civil war in America has proved the use of steam to assist powerfully in their evasion, as to render it unwise to shackle the belligerent with too severe restrictions. If it is wished altogether to deprive

blockades of efficacy, it would be franker and better to propose to sweep them away altogether. (Hall, International Law, pp. 728, 729, 730.)

To the same effect is Lawrence, International Law (Cambridge, 1895), where Professor Lawrence says:

> The declaration of Paris has a clear, practical meaning:
>
> Blockades to be binding must be effective. The words which follow require an impossibility if they are taken in the strictest literal sense. They define an effective blockade as one "maintained by a force sufficient to prevent access to the coast of the enemy;" and a small boat might frequently pass through the most numerous and efficient squadron. It is, however, clear from explanations given by the ministers of the various countries which signed the declaration that nothing further was intended than the assertion of the principle that there must be a *real danger* in any attempt to pass through (Wheaton, International Law, Dana's ed., note 233; Lawrence, International Law, p. 578, sec. 269, Cambridge, 1895).
>
> We are often told, for instance, that the blockading vessels must be stationary, sometimes that they must be anchored, and even that the approaching ship must be under a cross fire of at least *two* of them. These statements are among the curiosities of the literature of international law, but they have no connection with the hard facts of international relations. The Institute de Droit International has not embodied them in its maritime code; and it may safely be said that the accepted authorities of effective blockade do not go beyond the wording of the fourth article of the declaration of Paris. (Lawrence, International Law, p. 599, sec. 269, Cambridge, 1895.)

What a sufficient force is can not be determined with logical rigor. It may be said to be such a force as will involve a vessel attempting to pass the line of blockade in considerable danger of being taken. (Woolsey's Internat. Law, 343.)

In International Law, Woolsey (p. 344), it is stated:

> Dr. Lushington remarked that the maintenance of a blockade must always be a *question of degree*—of the degree of danger of ships going into or leaving a blockaded port. No force could bar the entrance to an absolute certainty; vessels may get in or out during the night or fogs or violent winds or occasional absence. It is most difficult to judge from numbers alone. And adds, that in no case a blockade was held to be void when the blockading force was on or near the place of entry or visit.

That the Declaration of Paris was to correct "paper blockades" or "cabinet blockades" of the early century, where either no force guarded an interdicted port, or a war ship only occasionally appeared there, and that that was the understanding at the time both of England and the United States, thereafter invited to join therein, also fully appears in the last edition of Hall's International Law, Oxford, 1895, page 730, note, where the author says:

> With reference to the meaning of the Declaration of Paris, Lord Russell, in 1863, wrote as follows: "The Declaration of Paris was, in truth, directed against what were once termed 'paper blockades;' that is, blockades not sustained by any actual force, or sustained by a notoriously inadequate naval force, such as an occasional appearance of a man-of-war in offing, or the like. * * * The interpretation,

> therefore, placed by Her Majesty's Government on the declaration was that a blockade, in order to be respected by neutrals, must be *practically effective.* * * * It is proper to add that the same view of the meaning and effect of the articles of the Declaration of Paris, on the subject of blockades, which is above explained, was taken by the representative of the United States at the Court of St. James (Mr. Dallas) during the communications which passed between the two Governments some years before the present war, with a view to the accession of the United States to the declaration." Lord Russell to Mr. Mason, February 10, 1863, ap. Bernard, 293. (Hall's International Law, p. 730, note.)

It appears, therefore, that the key to this question is that an effective blockade under the Declaration of Paris is one that is "practically effective."

The facts in this case show it to be "practically effective," by capture of the *Olinde Rodrigues after* warning by United States steamer *Yosemite*, entered in the log book of the *Olinde Rodrigues* July 5, and *after* her defying signals to her to stop, July 17, while running the blockade into San Juan.

This *practical* effectiveness has always been the test of a legal blockade.

In *The Mercurius* (1 Rob., 80, 84) Sir William Scott very tersely and with a robust common sense thus sums up this question:

> It is said this passage to the Zuyder Zee was not in a state of blockade, *but the ship was seized immediately on entering it, and I know not what else is necessary to constitute a blockade.* The powers who formed the armed neutrality in the last war understood blockade in this sense; and Russia, who was

> the principal party in that confederacy, described a place to be in a state of blockade when it is dangerous to attempt to enter it.

It was surely dangerous for the *Olinde Rodrigues* to attempt to enter San Juan on July 17 when she saw the *New Orleans* and defied the signal to stop, and the exploding shell of the cruiser *New Orleans* fell just in front of her when she was captured.

And in *The Frederick Molke* (1 Rob. Rep., 86–88), Sir William Scott says again:

> For that a legal blockade did exist results necessarily from these facts, as nothing further is necessary to constitute blockade than that there should be *a force* stationed to prevent communication and *a due notice or prohibition given to the party.* * * *
>
> For what is the object of blockade? Not merely to prevent an importation of supplies; but to prevent export as well as import; and to cut off all communication of commerce with the blockaded place. I must, therefore, consider the act of egress to be as culpable as the act of ingress, and the vessel on her return still liable to seizure and confiscation.

The decisions of our own courts during the civil war are to the same effect, requiring a *practical* efficiency only.

> All that was necessary was that an adequate force was assigned and stationed off these ports at the time of the egress from them of the above-named vessels, so as to render the ingress or departure of the vessels to or from the ports *dangerous.* There *need not be a close cordon of vessels* surrounding the places at all times, so as absolutely to command all approaches to the ports from without or departure from

them from within. The blockade must, however, be so sustained by *competent forces* as to render it *efficient* to all ordinary intent and apprehension. This, of course, admits of the accidental absence of blockading vessels from stress of weather or other contingencies, and will also dispense with the employment of the more active and rapid services of steam vessels in such accumulation of watchful forces as is sometimes exacted when ships moved by canvas only are used. What the law demands is the allotment and stationing of that amount of force for the service which shall render it physically hazardous for other craft to evade the blockade. (The *Sarah* (case No. 12352), 21 Fed. Cas., 462, 470; Blatchford Prize Cases, 69.)

In the same spirit the circuit court of New York held that the fact of capture of a brig upon arrival at the port demonstrated that the blockade was *effective*. (*Hallie Jackson*, Blatchford Prize Cases, 41; 11 Federal Cases, 290, 292.)

So the Supreme Court of the United States, following Nelson in his blockade of Genoa, quoted *infra*, says:

> We have already held that a blockade once established and duly notified must be presumed to continue until notice of discontinuance in the absence of positive proof of discontinuance by other evidence; and we do not think that the testimony of the master and mate *that they saw no blockaders* when entering or leaving Calcasieu Pass supplies such proof. * * *
>
> It goes to establish guilty intent. *So, too, the endeavor to escape* from the *Bainbridge*. No such attempt would have been made had the officers of the *Baigorry* been unconscious of any infringement of the blockade. (The *Baigorry*, 2 Wall., 480.)

> A blockade once regularly proclaimed and established will not be held to be *affected* by continual entries in the log book, supported by testimony of officers of the vessels seized, that, the weather being clear, no *blockading vessels were to be seen* off the port from which the vessels sailed. (The *Andromeda*, 2 Wall., 481.)

In the case at the bar the *Olinde Rodrigues* saw the cruiser and, defying signal, endeavored to escape until brought to by shot on July 17, after she had been warned off the port on July 5.

It is argued that all the previous American cases and American views on "effective blockade" are erroneous, because it is claimed the United States accepted the Declaration of Paris for the first time in the war with Spain. This is a mistake. In Wharton's International Law, Dig., Vol. III, p. 379, sec. 361, it is stated:

> As early as April 24, 1861, when Mr. Lincoln's administration had only been in office six weeks, but when it was already apparent that the secession movement then begun would speedily have possession of most of the ports of the Southern States, Mr. Seward addressed a circular to the ministers of the United States and Europe in which he declared the adhesion of the United States Government to the rule that blockades in order to be binding must be effective; that is to say, maintained by a force sufficient to really prevent access to the coast of the enemy. (U. S. Dip. Correspondence, 1861, 34.)
>
> When President Lincoln proclaimed, as he did on the inception of the civil war, a blockade of the Southern coast, the proclamation was followed by an announcement to France and England that the

> blockade would be effective in the above sense; and it is important to observe that enormous as were the profits to be gained by blockade running and doubtful as was at least the friendliness of certain European courts toward the United States, not one of the maritime powers of Europe complained that the blockade was not effective.

It is thus clear that all of the prize cases of the civil war decided in the courts of the United States were decided in view of and in application from the American standpoint of the Declaration of Paris. It is also clear that all of the positions taken by the United States in their diplomatic correspondence during the civil war were after their adhesion to the Declaration of Paris, as this Government understood it. To say that the decided cases in this country are in conflict with the Declaration of Paris, and rendered before its acceptance by the United States (as the district court seems to hold), is an historical error which has gravely affected the court below.

This court has recently again announced that on the sea British and American jurisprudence alone govern it.

> Indeed, we have had frequent occasion to hold that the maritime usages of foreign countries are not obligatory upon us and will not be respected as authority, except so far as they are consonant with the well-settled principles of English and American jurisprudence. *The John G. Stevens*, 170 U. S., 113, 126, and cases cited; *The Elfrida*, 172 U. S., 203.

It is clear, therefore, as matter of legal principle that an "effective blockade" is one that is "practically effective" and dangerous to a vessel attempting to enter, and

that in modern international law there are no fixed arbitrary rules determining the number or location of the blockading force. The district court erred, therefore, in holding that as matter of law there could be no legal blockade without a "fleet of vessels," "a squadron," or "several vessels."

II.

IT IS NOT NECESSARY TO CONSTITUTE AN EFFECTIVE BLOCKADE OF A PORT OF A SINGLE ENTRANCE TO HAVE MORE THAN ONE MODERN CRUISER, IF THE PRESENCE OF THAT WARSHIP RENDERS IT DANGEROUS IN FACT FOR THE NEUTRAL SHIP TO ENTER THE PORT.

This proposition is a corollary of proposition first. The principle has been recognized and illustrated repeatedly in the history of international law.

In the Principles of International Law (1895, Lawrence, M. A., LL. D., Cambridge, England), the general principle is stated:

> Maritime law gives to a belligerent the right to prevent access to or egress from a port of his enemy by stationing A SHIP or a number of ships in such a position that they can intercept vessels attempting to approach or leave the port in question (p. 576, sec. 269).

We have several illustrations of the principle:

> In the Crimean war the port of Riga was blockaded by a *single British vessel* stationed 120 miles from the town in a narrow channel which formed the only navigable approach to the place. (Lawrence, Internat. Law, p. 583, sec. 272, Cambridge, 1895.)

Other writers state it as follows:

> During the Russian war in 1854 the blockade of Riga was maintained at a distance of 120 miles from the town by a ship in the Lyser Ort, a channel 3 miles wide which forms the only navigable entrance to the gulf. (Hall's International Law, p. 726; Snow's International Law, p. 154.)

The manifest reason of the effectiveness of this blockade is that even with small range guns at that time this channel or entrance to the port could be commanded by one ship.

An even stranger case occurred between our own Government and Great Britain after the United States had formally expressed acceptance of declaration of Paris in the civil war.

> The *Niagara*, blockading Charleston, had been sent away to intercept a cargo of arms expected at another part of the coast, and the harbor remained open for at least five days. Lord Lyons took it for granted that an interruption had occurred, but the Government of the United States, in view of the effect understood by it to flow from a general notification, refused to admit that any cessation had taken place. (Hall's International Law, 727.)

Here even with only *one* blockading vessel before Charleston the United States refused to admit even that an interruption had occurred by temporary absence.

Professor Walker, of Cambridge, gives a fuller statement of this case.

> On May 11 in that year (1861) the *Niagara* appeared off Charleston and continued warning off neutral ships until 15th, when she left. On the 28th

the *Minnesota* took up the vacated position. In face of these facts Mr. Seward contended that the blockade of the port of Charleston was carried into effect on the 11th and had neither been abandoned, relinquished, nor remitted. "I hasten," he wrote Lord Lyons, "to express the dissent of this Government from the position which seems to be assumed by your note that that temporary absence impairs the blockade and renders necessary a new notice of its existence. This Government holds that the blockade took effect at Charleston on the 11th day of this month and that it will continually be in effect until notice of the relinquishment shall be given by proclamation of the President of the United States." (Walker's International Law, 518–519, Cambridge, 1893.)

It is to be noticed here that the question raised was whether the absence of any vessel from the 11th to the 28th of May was an abandonment.

The fact that there was only *one ship* admittedly present before the interruption was not questioned by the British Government as an *effective blockade*. It was taken for granted as the basis of all the correspondence that one ship—the *Niagara*—had established and previous to her departure was in herself sufficient to maintain an "effective blockade" of Charleston. This case is of primal importance because the United States had just then, in April, 1861, announced its acceptance of the Declaration of Paris (see *infra*) and was interpreting it in her action and positions assumed.

In the case of *The Brilliante* (2 Bl., 635, 678, 679), it appears that a single United States ship of war blockaded

one of the mouths of the Mississippi River, the court stating:

> In approaching New Orleans with a cargo from Sisal she found the United States ship of war *Brooklyn* blockading the mouth of the Mississippi River at Pass a Loutre, and was by the officer of that vessel informed of the blockade and forbid to enter. * * *

It appeared in this case that the commander of the *Brooklyn* gave to a part owner of the vessel and cargo, who was on board, a letter to the commander of another ship of war farther along the coast; that on leaving the *Brooklyn* the *Brilliante* started along the coast in the direction of the other war ship, but instead of seeking that vessel evaded her and went to New Orleans by way of Lake Ponchartrain.

The following statement appears in Bernard's "Neutrality of Great Britain during the American Civil War," pages 239–40:

> Savannah was blockaded on the 28th of May [1861], by the *Union*, a small steamer of 600 tons, carrying five guns and thirty men, which had been chartered by the month for this service. She disappeared on the 1st June, leaving the port open, but returned on the 10th, and there was no subsequent intermission.

Page 241 refers also to the case of the *Brooklyn* at Pass a Loutre, in a letter from the British consul at New Orleans to Lord Russell, from which it appears that the steamship *Powhatan* was then the nearest ship on the blockade at Southwest Pass, 28 miles distant.

Thus on principle and authority *one ship* can, as matter of law, constitute an effective blockade of a *port*

with a single entrance, or of one of the entrances of a port having more than one entrance. The only question that arises in such a case is whether such blockade is "practically effective." The district court therefore erred in holding as matter of law that one war ship could not be an effective blockade of such a port with a single entrance.

III.

A MODERN CRUISER OF THE TYPE, SPEED, ARMAMENT, AND RANGE OF GUNS OF THE UNITED STATES CRUISER "NEW ORLEANS," I. E., AN ARMORED MODERN CRUISER OF 22 KNOTS MAXIMUM SPEED, 32 GUNS, AND 6½ MILES RANGE OF GUNS, SHOOTING RIFLE SHELLS, WAS IN FACT AN "EFFECTIVE BLOCKADE" OF THE PORT OF SAN JUAN, WITH ITS SINGLE ENTRANCE, ON JULY 17, 1898.

The facts of the blockade are that the *Yosemite*, a converted auxiliary cruiser, formerly the *El Sud*, of the Morgan Line (Burns, fol. 259), a converted merchant ship (Emory, fol. 240), blockaded the port until July 14, 1898.

The speed of the *Yosemite* was 15½ knots (Burns, fol. 261). The armament of the *Yosemite* was 18 guns, all small with greatest range of 3½ miles (Emory, fol. 244). Ten 5-inch rapid-firing guns; six 6-pounders; two 1-pounders (Emory, fol. 240).

Afterwards, on July 14 and thereafter, the port of San Juan was blockaded by the United States armored cruiser *New Orleans*, thereby quadrupling the efficiency of the blockade.

Her maximum speed was 22 knots (Folger, fol. 160). Her armament was *32 guns*. Six 6-inch breech-loading rifles; four 4.7-inch breech-loading rifles; ten 6-pounders; four 1½ inch corresponding to 3 pounds; four 3-pounders in the tops; four 37-millimeter automatic guns (Rooney, fol. 311).

The range of her guns was 11,000 yards, or 5½ sea miles, 6½ statute miles (Rooney, fol. 340). It will thus be seen that the blockade was vastly strengthened and rendered fourfold more effective by the armored cruiser *New Orleans*. There is no evidence that any vessel ever eluded her in that blockade either in ingress or egress. The elements of this effectiveness were—

(1) Standing still, and commandiug by her rifle shells a circle of 13 miles diameter, the *New Orleans* was, in herself, "an arc of circumvallation" of old-time war ships. Stationed 6 miles off San Juan she would command the port and its approaches by her guns, and no other vessel was necessary. It would take at least 6 war ships of the early part or middle of the century, with their small range of guns, to equal her practical efficiency, if they were stationed around the port. So, also, when the *New Orleans* moved, covering the broad path of 13 miles by her guns alone, she was a great naval scythe, or mowing machine, sweeping the waters in front of San Juan.

(2) By night she could, by electric search lights, illuminate the sea for 10 miles.

(3) She could not, as sailing war ships of the early century, be blown away by winds or drifted off by currents.

(4) This one modern armored cruiser, the *New Orleans*, was also in cost to the belligerent more than twice the cost of a fleet of frigates of the old naval warfare, both in equipment, manning, and maintenance.

(5) It is to be remembered also that the *port* of San Juan was blockaded, not the coast; and that San Juan has only one entrance which she was blockading. (See Plat A, frontispiece, Porto Rico.)

Six blockading war ships of the type mentioned by Sir William Scott in the *Nancy* (1 Dodson, 423), i. e., the British brig *Blazer* and the British schooner *Pax*, could not so command the port or the sea, either stationary or moving as a fleet, in front of San Juan.

In fact, the cruiser *New Orleans* was a scientific modern unit, representing in herself the effectiveness of an old-time fleet or squadron. In the same way that she could herself have caught and fought single handed and destroyed such a fleet, in the same way, as a blockading force, she could, by her long range of guns, be even more effective and more dangerous than such a fleet as a blockading force.

Having nearly double the range of guns as the *Yosemite*, she covered four times the area by her guns. In blockading efficacy she was by this greater range of guns and vaster speed equal to more than four war ships of the type of the United States auxiliary cruiser *Yosemite*, formerly a merchant vessel, whom she succeeded in blockade of San Juan on the 14th of July, evidently with a view by United States to make fully effective the blockade of San Juan by its fastest cruiser with long-range guns.

Nor will it do to say that increased speed of steam vessels in running the blockade does away with this effectiveness of the concentration of many units in the single modern unit of the *New Orleans*. Increase of steam power in the blockade runner may offset, in a measure, increase of speed in the blockader; but the *increased range of guns* in the blockading cruiser can not be offset by anything in the blockade runner, and it remains true that the modern cruiser *New Orleans* covering a circle of 13 miles by her guns off San Juan commands the same area as six war ships of the old type stationed in a circle around that port of San Juan.

Moreover, when we consider the additional factor of the phenomenally great speed of the *New Orleans* in this case, a maximum speed of 22 knots, the practical efficiency becomes even greater than an old-time fleet of sailing vessels. Standing still, the *New Orleans* covered a circle of 13 miles with her guns. If we add her speed to the range of her guns, the result is as follows:

In six minutes she could cover any point on a circle of 17 miles diameter.

In ten minutes she could cover any point on a circle of 19 miles diameter.

In fifteen minutes she could cover any point on a circle of 23 miles diameter.

In thirty minutes she could cover any point on a circle of 33 miles diameter.

In one hour she could cover any point in a circle of 53 miles diameter.

This is a terrible omnipresence, not dreamed of in

the naval warfare of a century or half a century ago, and not possible to a whole fleet or squadron of that period.

It was this sudden omnipresence, by reason of speed and range of guns combined, that startled the *Olinde Rodrigues*, unmindful of the full meaning of this modern scientific unit that represented an old-time fleet in effectiveness, as the *New Orleans* swooped down upon her even from the northeast as an eagle from its commanding perch, and seized her, defiantly after warning, running the blockade from the northwest.

This concentration of power in the unit is the great feature of this scientific age. This doctrine of modern equivalents of the one for the many is in force in every department of life and action. One locomotive represents the long time of toiling wagon trains and stage-coaches. One reaper represents a hundred harvesters. Life in the modern world teems with this concentration and consolidation, to effect in the quickest way the desired result. This is man's greatest achievement in the material world and the highest expression of his dominion on earth.

Nowhere is it more manifest than on the sea. It is peculiarly so in naval warfare, where millions are now spent in one battle ship that would formerly build several fleets. But the modern battle ship alone could vanquish all old-time fleets of many ships.

No one in the practical world insists that this paramount law of modern life shall be disregarded and that the concentrated unit shall not be an equivalent for what it actually represents in effectiveness.

And it is idle to say here that because in 1804 it required by treaty *two* sailing ships, little brigs and schooners, with two or three miles range of guns at the most, to blockade a port, or because in 1760 it was required by some continental powers to have several of these little ships anchored or stationed in a row around the port, that for that reason *one* modern cruiser of the type and effectiveness of the *New Orleans*, with her sweep and power, many times more efficient as a blockading force, can not *as matter of law* constitute a legal blockade, and does not as a *matter of fact* constitute a practically "effective blockade."

It is idle to say that there must be a useless and senseless multiplication of this costly, powerful, and far-reaching modern unit, and that only several of such modern cruisers can, in law, blockade a port. Such a position is not practical; it ignores the whole scientific philosophy of this age and would destroy the very object and purpose of the concentration in the costly and highly developed unit the power and efficiency of many inferior units of the past.

This blockade was therefore not only theoretically effective, but as matter of fact was practically effective in the actual capture of the *Olinde Rodrigues* attempting to violate it on July 17.

IV.

THE FACT OF ACTUAL CAPTURE OF THE "OLINDE RODRIGUES" BY THE UNITED STATES CRUISER "NEW ORLEANS" WHILE ATTEMPTING TO VIOLATE THE BLOCKADE OF SAN JUAN ON JULY 17, 1898, AFTER SHE HAD BEEN WARNED OFFICIALLY OF THE BLOCKADE BY ENTRY IN HER LOG ON JULY 5, 1898, BY THE UNITED STATES STEAMER "YOSEMITE" OFF SAN JUAN, AND AFTER SHE REFUSED TO OBEY SIGNAL OF UNITED STATES CRUISER "NEW ORLEANS" ON JULY 17, WAS ITSELF A CONCLUSIVE DEMONSTRATION OF THE EFFECTIVENESS OF THE BLOCKADE.

Sir William Scott first decided this principle in a case so apposite that we quote it fully.

In the *Mercurius* (1 Rob., 80, 82–84) Sir William Scott says:

> By the evidence it appears that when the vessel approached the Texel the master was warned by the officer who boarded her that he must not go into the Texel. The officer wrote on the manifest, "Hindered from going into the Texel." The inability of the master to proceed into the Texel therefore proves the blockade; for a blockade may exist without a public declaration, although a declaration unsupported by fact will not be sufficient to establish it.
>
> It has been so determined by the Supreme Court during the present war. The West India Islands were declared under blockade by Admiral Jarvis; but the Lords held that, as the fact did not support the declaration, a blockade could not be deemed legally to exist; but the fact, on the contrary, duly notified on the spot, is of itself sufficient, for public

notifications between governments can be meant only for the information of individuals. But if the individual is personally informed, that purpose is still better obtained than by a public declaration. * * *

The master pretended to be proceeding to Hamburg till he came to the passage into the Zuyder Zee, and then he attempted to enter it. How far the blockade might extend to all ports in the Zurder Zee I shall not now inquire, because I am sufficiently convinced that the intention of this master was to proceed to Amsterdam, in defiance of the prohibition, which he distinctly understood. * * *

It is said this passage to the Zuyder Zee was not in a state of blockade, but the ship was seized immediately on entering it, and I know not what else is necessary to constitute a blockade. The powers who formed the armed neutrality in the last war understood blockade in this sense; and Russia, who was the principal party in that confederacy, described a place to be in a state of blockade when it is dangerous to attempt to enter it.

This is strong common sense. It is the logic of experience. "It is said this passage to the Zuyder Zee was not in a state of blockade, but the ship, after warning, was seized immediately on entering it, *and I know not what else is necessary to constitute a blockade.*"

This is the language of the first English judge in prize law. It is now axiomatic. The proof of the blockade is the seizure on actual testing. It is not a speculative, theoretical matter, after you are warned and act at your peril. It is a serious matter of hard fact after due notification, and does not allow of any technicalities or niceties of logic or arbitrary rule.

This principle, now fixed as the test in modern international law, was judicially declared also by our own courts in the case reported in Blatchford's prize cases when the court declared.

> That there was in fact an *effective blockade* established at the port on the arrival of the brig is demonstrated by her arrest there. (*The Hallie Jackson*, Blatchford Prize Cases, 41; 11 Fed. Cases, 290, 292.)

Again, at page 155, Snow's Internat. Law (1898), the principle is further illustrated:

> In reference to the actual visibility of a blockading vessel or vessels from the blockaded port, it must be borne in mind that the necessary requirements are to make ingress to or egress from the port dangerous. It is not necessary that the blockading vessel should be in sight from the blockaded port. Nelson states, for instance, that fault was found with the blockade of Genoa, on the ground that it did not comply with the requirements of international law, the complaint resting apparently upon the statement that the blockaders could not be seen from Genoa. Nelson replied that the proof of evident danger to vessels seeking to enter or leave rested on the fact that captures were made; and it is, he said, "absurd to say that there can be no danger to a vessel seeking to enter a blockaded port because the blockading vessels are not visible to the port. Much more depended upon their number, disposition, and speed." He further said:
>
> "From my knowledge of Genoa and its gulf I assert, without fear of contradiction, that the nearer ships cruise to Genoa the more certain is the escape of vessels from that port or their entrance into it as-

> sured. I am blockading Genoa according to the orders of the admiralty and in the way I think most proper. Whether modern law or ancient law makes my mode right, I can not judge; and surely of the mode of disposing of a fleet I must, if I am fit for my post, be a better judge than any landsman, however learned he may appear."

This is nautical common sense, and is in accord with our practice and instructions.

> Empirical rules prescribing the number of vessels their anchorages, situations, etc., as made by some continental powers are not practical and have no connection with either intelligent practice or the hard facts of sea blockades. (Snow, Internat. Law, p. 155.)

"The proof of evident danger is the fact of capture." This is the latest utterance of the professor in international law of Harvard University in his lectures delivered before the Naval War College and published in 1898 by direction of the Navy Department of this Government, and it concurs with the principles as announced by the most recent and authoritative expounders of international law at Oxford and Cambridge and as decided in our cases, as cited above. Moreover, it was on these principles that the United States Navy Department expressly based its actions and instructions in this war, and the result is the practical efficiency of this blockade of San Juan, demonstrated by the actual capture of the *Olinde Rodrigues* on July 17, 1898.

We have previously seen that this court had adopted the theory of Lord Nelson that the visibility of blockaders from the port was not necessary. (The *Baigorry*, 2 Wall., *supra*.)

And we find the interpretation of the declaration of Paris, as expounded by the professor at Cambridge, England, is to the same effect. He says:

> This broad principle (declaration of Paris) is by reason of its very generality better suited than mere detailed rules to the conditions of maritime *warfare to-day*. No more effective blockade could well be devised than that maintained by a strong service of swift steamers *cruising* on regular stations off the affected *coast*. (Walker's Science of International Law, Cambridge, 1893, pp. 517-518.)

If cruising is the most effective blockade for a *coast*, then the rapid movements of a fast cruiser circling about a port and commanding its single entrance is the most effective blockade in modern warfare for a *port*. So that the movements of the *New Orleans* in front of San Juan as a blockader of that port has the high sanction of the most illustrious and most effective English sailor, the authority of the latest text writers, and the positive direction of the Navy Department of the United States in adopting Professor Snow's book as a guide to the United States Navy.

Such was the practical effectiveness of this blockade. Such concentration of efficiency, in fact, was never dreamed of even half a century ago. It excelled a fleet of old sailing ships and was more dangerous than a squadron of old-time frigates. The blockading cruiser was the ripest product of a material civilization that had wrought some of its greatest miracles in naval architecture and in the concentration of force in engines of maritime warfare. It far exceeded in effectiveness the "cross fire" of two ships of the old Continental writers

on international law, and was more dangerous than the "arc of circumvallation" of six sailing ships of a century ago.

Nothing could be more significant of the practical effectiveness of this blockade than the fact of this capture; the *New Orleans* plunging down from 14 miles from the northeast of Morro and in twenty-two minutes putting under her guns the *Olinde Rodrigues* just as both the cruiser and *Rodrigues* were, in the chase, drawing under the guns of Morro and the shore batteries, and compelling the *Olinde Rodrigues* to come to her 5 miles, while she waited and watched the Swedish bark to the northeast.

Nothing could better demonstrate the *fact* of the effective blockade than the capture and arrest there and then of this steamer, running away and defying the flag signal to stop, until the rifle shell stopped her. To her it was both actually dangerous and effective, and that after full and fair warning on July 5, repeated by signal July 17. (Eustis, p. 118; Burns, p. 121.) And it is impossible, after her capture there, when she tested it to the bottom and found it effective in fact, to aver it to be not "effective" now.

Against the practical effectiveness in fact, the claimant moreover cannot set up the mistaken opinion or erroneous belief of the master of the *Olinde Rodrigues* that the blockade was not effective or nonexistent. The master of the *Olinde Rodrigues* makes no such claim for himself. Indeed, he says he went to the cruiser as soon as he saw her, although his log shows he ran twenty minutes (which

is the whole time of the chase) after he saw her before he turned toward her. But, even if it were true that he acted under an erroneous impression, and his judgment was bad, that the blockade was not effective, this would not justify him or relieve him, for he had previous written notice in his log of the blockade, and could not experimentally test it thereafter on any theory of non-effectiveness.

This court dealt very summarily with this identical plea in the case of the *Admiral* (6 Wall., 604).

The case is stated as follows:

> On December 11, 1861, when about 30 miles off Tybee Island, that lies near the entrance of Savannah, she was boarded by a United States ship, * * * and professed that in coming to the region in which she was her purpose was to ascertain whether the blockade was raised, as she supposed when leaving England that it would be, numerous predictions to that effect having been made before she left England, as also confident assertions that the Federal Government would find it impossible to blockade effectually the Southern coast 3,000 miles in length (pp. 606, 607).

But this court in condemning the ship answered this subterfuge as follows:

> Every pretense that the vessel intended to desist from her unlawful purpose, if she found that the port was blockaded, is negatived by the circumstances. Those in charge of her knew before sailing that the port was blockaded, and they also knew that they had no reason to suppose that it was to be raised before her arrival; consequently they made no inquiry and did not wish to make any until it became

necessary to do so as a defense or excuse for an illegal act. (Idem, 616.)

The case at bar is stronger than *The Admiral*, for in the present case there was distinct warning entered in the log on July 5, and distinct notice by signal, defied on July 17 on the spot, the *Olinde Rodrigues* well knowing that the blockade was still existing.

V.

THE OLINDE RODRIGUES HAVING BEEN OFFICIALLY WARNED OF THE BLOCKADE ON JULY 5, 1898, OFF SAN JUAN, BY ENTRY IN HER LOG, THE DECLARATION OF THE BLOCKADE WAS SUPPORTED BY THE FACT OF WARNING ON THE SPOT, AND BEING CAPTURED THEREAFTER ON JULY 17 WHILE ATTEMPTING TO ENTER PORT OF SAN JUAN, SHE CAN NOT NOW PLEAD THAT THE BLOCKADE WAS NOT EFFECTIVE.

Snow's International Law (151, 152; Washington, 1898), quoting Kent, says:

> It is absolutely necessary that the neutral should have had due notice of the blockade in order to affect him with penal consequences of a violation of it. This information may be communicated to him in two ways, either actually, by a formal notice from the blockading power, or constructively, by notice to his Government, or by the notoriety of the fact. It is immaterial in what way the neutral comes to the knowledge of the blockade. If the blockade actually exists and he has a knowledge of it, he is bound not to violate it. A notice to a foreign Government is a notice to all the individuals of that nation; and

they are not permitted to aver ignorance of it, because it is the duty of the neutral Government to communicate the notice to their people.

And Snow continues (p. 151):

The French practice, which is also followed by Italy, Spain, and Sweden, is to give a notification from the Government of the blockading state, and a notice from a vessel of the blockading force of a port. Each neutral vessel is individually warned by one of the blockading squadron, a vessel not blockading being considered incompetent to warn the vessel. The warning is indorsed on the ship's papers, with date and locality, and only on subsequent attempts to enter is the vessel liable to seizure. Comparing the two methods, Hall says:

"The theory accepted in England and the United States is the natural parent of a more elastic usage. Notification is a convenient mode of fixing a neutral with knowledge of the existence of a blockade, but it is not the necessary condition of his liability to seizure. In strictness, if a neutral vessel sail with the destination of a blockaded port from a place at which the fact of the blockade is so notorious that ignorance of its existence is impossible, confiscation may take the place upon seizure without previous warning. But in practice, notification of some sort is always given. If the blockade is instituted under the direct authority of the Government the fact of its commencement is notified to foreign states. The information thus communicated affects their subjects, who must be supposed to be put in possession of the knowledge which is afforded with the express object of its being communicated to them."

Furthermore, if approach for inquiry or for warning, after due general notification, were permissible

in these days of fast steamers, "it will be readily seen," as Judge Field observed, "that the greatest facilities would be afforded to elude blockade."

"A vessel which has full knowledge of the existence of a blockade before she enters upon her voyage has no right to claim a warning or indorsement when taken in the act of attempting to enter. It would be an absurd construction of the President's proclamation to require a notice to be given to those who already had knowledge. A notification is for those only who have sailed without a knowledge of the blockade and get the first information from the blockading vessel."

In the instructions to blockading vessels and cruisers, drawn up for the war with Spain, the following paragraphs bear on this subject:

3. Neutral vessels are entitled to notification of a blockade before they can be made prize for its attempted violation. It may be actual, as by a vessel of the blockading force, or constructive, as by a proclamation of the Government maintaining the blockade, or by common notoriety. If a neutral vessel can be shown to have had notice of the blockade in any way, she is good prize, and should formal notice not have been given, the rule of constructive notoriety should be construed in a manner liberal to the neutral.

4. Vessels appearing before a blockaded port, having sailed without notification, are entitled to actual notice by a blockading vessel. They should be boarded by an officer who should enter in the ship's log the fact of such notice, such entry to include the name of the blockading vessel giving notice, the extent of the blockade, the date and place, verified by his official signature. The vessel is then to

be set free, and should she again attempt to enter the same or any other blockaded port as to which she has had notice, she is good prize.

6. A neutral vessel may sail in good faith for a blockaded port, with an alternative destination to be decided upon by information as to the continuance of the blockade obtained at an international port. But in such case she is not allowed to continue her voyage to the blockaded port in alleged quest of information as to the status of the blockade but must obtain it and decide upon her cruise before she arrives in suspicious vicinity; and if the blockade has been formally established with due notification, any doubt as to the good faith of such a proceeding should go against the neutral and subject her to seizure. (Snow, International Law, 152, 153.)

The notice to the *Olinde Rodrigues* complies fully with all these requirements. It appears from the evidence that the entry of warning was made in the log of the *Olinde Rodrigues* on July 5, in front of Morro, San Juan, by the United States auxiliary cruiser *Yosemite*, as follows: "Warned off San Juan July 5, 1898, by U. S. S. *Yosemite*, Commander Emory" (fols. 91–93), and the master of the *Olinde Rodrigues* himself writes in his "*Rapport de mer*" (sea report) on July 5, 1898, "They (officers of *Yosemite*) notify me that the blockade of the port of San Juan is official, and that on the return I will not be able to enter it" (fol. 94).

Now, the effect of this notification on the spot is of the highest importance in this case in determining not only notice but an effective blockade.

Again, Hall says:

It is impossible to fix with any accuracy the amount of danger in entry which is necessary to

> preserve the validity of a blockade. It is for the prize court of the belligerent to decide whether in a given instance a vessel captured for this breach had reason to suppose that it was nonexistent. (Hall's Internat. Law, p. 726.)

So this vital question is settled in this case by the entry in the log on July 5, both by the officers of the *Yosemite* and master of the *Olinde Rodrigues*, of the distinct warning and prohibition, and it was with full knowledge and in defiance of the warning and in defiance, also, of the *New Orleans* signal to "stop instantly and heave to" on July 17 that she attempted to violate the blockade.

Under the principle announced she had no reason to suppose the blockade to be nonexistent on July 17 on her return, and is liable as a prize for deliberate violation of the blockade duly notified.

VI.

THE FRENCH GOVERNMENT NOT HAVING COMPLAINED THAT THE BLOCKADE OF THE PORT OF SAN JUAN WAS NOT EFFECTIVE, AND THE BLOCKADE HAVING EXISTED ONLY TWENTY DAYS WHEN THE "OLINDE RODRIGUES" WAS CAPTURED ON JULY 17, 1898, AFTER WARNING, ENTERED IN HER LOG ON JULY 5, 1898, THE "OLINDE RODRIGUES" CAN NOT NOW CLAIM THAT THE BLOCKADE WAS NOT EFFECTIVE.

We have seen that on the question of the amount of danger necessary to preserve the validity of a blockade the court must determine the question of notice and also

reason the neutral had to suppose the blockade nonexistent. There is another principle. It was for "the neutral government to examine on the particular facts whether it is proper to withhold or withdraw recognition." (Hall, International Law, p. 726.)

We have noticed an illustration of this in the case of the *Niagara*, between Great Britain and the United States, *supra*.

Now, there is no evidence that France ever withdrew or withheld recognition of this blockade of San Juan, a step she must take at the time to be valid. The blockade stands, therefore, as to France, as a legal blockade, and being notified on the spot twelve days in advance of the actual capture of the *Olinde Rodrigues*, it is effective and legal against the French ship.

Again, a further principle operates here, inasmuch as the blockade proclaimed on June 27 was only twenty days in existence when the *Olinde Rodrigues* was captured, and inasmuch as no complaint or warning had been made by France to the United States as to its effectiveness.

> At the commencement of a blockade neutral powers are not exacting in their requirements as to the force necessary to make it effective. But if after a reasonable time has elapsed their warnings remain unheeded and the number of vessels stationed off the blockaded ports is obviously insufficient to close them, their government will decline to recognize the validity of any captures of the merchantmen for breach of the so-called blockade and will demand reparation for alleged seizure and condemnations. (Lawrence International Law, 582, sec. 271, Cambridge, 1895.)

So that even if there was by any possibility a cause of complaint by France, it existed within the first twenty days of the blockade, at a time when by the law of nations "*neutral powers are not exacting in their requirements as to the force necessary to make it effective,*" and as to which there have no warnings given by France or unheeded by the United States. So that in every aspect of the question the blockade is legal and effective and France and the *Olinde Rodrigues* equally bound by the legality of the capture.

CONCLUSION.

In conclusion, we respectfully submit that the evidence in the case shows on the part of the United States steamship *Yosemite*, on July 5, 1898, the highest consideration toward the *Olinde Rodrigues*, by giving full credence to her claim at that time that she had not known of the blockade of San Juan when she entered on July 4, 1898, and by allowing her to proceed after entry of the warning on her log on July 5, so that on her return thereafter there might be no question as to her full and official knowledge of the blockade.

The evidence further shows that, notwithstanding this due notification on the spot, the *Olinde Rodrigues* was during twelve days obtaining health bills and clearances for her return to San Juan; and, on the morning of July 17, 1898, although her master swears he saw the *New Orleans* and knew of the blockade, was captured while attempting to run into San Juan in defiance of the original prohibition and in disobedience of the signal then

and there of the *New Orleans* to "stop instantly and heave to."

The enforcement of the belligerent's rights, therefore, in this case was only after every other means, consideration, courtesy, and warning, twice repeated, had failed, and the United States was compelled, in protection of its undoubted and violated right, to seize the deliberate and determined violator of this blockade. In the language of Captain Folger, of the *New Orleans:* "I did not want to seize the vessel; I did not want any international question at all; I preferred not; but in face of the appearance of things I had to seize the vessel or I would have had trouble" (fol. 183).

We find, moreover, that the Navy Department had strengthened fourfold the blockade of San Juan by sending the armored cruiser *New Orleans* to take the place of the auxiliary cruiser *Yosemite,* and that in practical effectiveness of this blockade by a warship of the type of the *New Orleans,* and the means of enforcing it in her armament, both the commander of the *New Orleans* in his action and the Navy Department in its instructions were acting on the settled principles announced and the precedents established by the United States in the interpretation of the declaration of Paris for forty years, according with the English and German view, and of which all the neutral powers have had notice for over thirty years.

To say that this capture is illegal is to ignore the whole diplomatic and judicial history of the United States on this question. To say that it is a marine trespass is to

say that the imperative duty of the naval commander, under the principles and authority of modern international law and the direct instructions of his Government, was a malicious tort, and that the claimant company here and the officers and crew and passengers of this steamer have a claim for such arrest and detention and forcible carrying away to the United States. To say that such a grave charge is true, and that such a claim, serious in all its aspects, is valid, is to say that the officers of the Navy, the Navy Department, and the Government of the United States have departed from plain duty and ignored principle and authority in order to commit and justify a gross and deliberate aggression upon unoffending neutrals under the pretense of belligerent rights. The facts of the case, the history of the naval service and of diplomacy, and the science of law alike repel this imputation.

We confidently submit the question to this court, and ask for a reversal of the decree below.

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J. P. KENNEDY BRYAN,
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In the Supreme Court of the United States

OCTOBER TERM, 1898.

THE UNITED STATES, APPELLANT,
v.
THE STEAMSHIP "OLINDE RODRIGUES," La Compagnie Générale Transatlantique, claimant.

No. 704. In Prize.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

BRIEF IN REPLY TO MOTION TO ADMIT CERTAIN DOCUMENTS.

By this motion it is sought to bring before the court certain reports from officers of the Government relative to the San Juan blockade, appearing in a publication of the Navy Department issued after the final hearing below. The United States opposes the motion, and respectfully submits the following reasons:

First. These reports are not evidence. They are not now relevant or competent. They are isolated statements

transmitting official information to superior officers, and consist largely of opinion and hearsay. That the opinions are official and the reports part of a public document makes no real difference.

Second. There is no reference to these reports in the record. Although a late effort may have been made to introduce them or insert them in the record below, the effort failed, and properly, because the offer came too late and was made irregularly. It is no answer to say that the question was presented below as soon as the reports were discovered. A cause can not stand over for the introduction of later discovered information bearing on it, otherwise it might never be closed. There must be a limit. The claimants had an opportunity below, under the order of the court, to offer additional proof, although perhaps not entitled thereto in view of the facts as to concealment and destruction of papers and the authorities on that point. (*The Fortuna*, 3 Wheat., 236.) The claimants might then have obtained proper evidence from the officers in question. They did not avail of the opportunity to take such testimony or any other testimony; they can not now do so in this way. We earnestly contend that they are not entitled to further proof in any view; but while this court may order further proof in its discretion as to material matters which are not sufficiently proved (*The Adeline*, 9 Cr., 244; *The Grotius*, 8 Cr., 456; *The Sally Magee*, 3 Wall., 451), the practice clearly is to hear the cause in the first instance upon the record from below (*The London Packet*, 2 Wheat., 372).

Third. Besides the formal objections, to admit these reports without explanation would work real and grave injustice to the United States and the captors.

The reports relate to the effectiveness of the San Juan blockade. If they are to come before the court at all, the United States should have an opportunity to show the meaning of the officers in question—with reference to what time, conditions, and contingencies they were speaking, and what the other facts of the blockade were as illustrating its nature and history from both the military and commercial standpoints. To introduce these statements and opinions without explanation or counter-proof would amount to putting these officers on the stand for *ex parte* examination without giving the Government and captors an opportunity to cross-examine.

It may be said that to cross-examine would be for the Government to ask for further proof after its case is closed as to a point upon which it might have examined below. This is not true, and the situation is exactly the reverse. The claimants are asking irregularly for further proof after an opportunity below unavailed of (Rec., p. 105) and upon information coming to light after all proofs were in; and they ask for further proof in such a form that the Government is deprived of a fundamental and essential right.

As a rule, allowing further proof to one party in a prize case opens the case to the other party also. (The *Sally*, 1 Gall., 401; *The Maria*, Spinks' Prize Cases, 323; *The Adriana*, 1 Rob., 313.)

If the court deem it well to have this information before them, then the Government respectfully submits

that it should be permitted to show the meaning of these reports by formal counter proof or by sworn statements. Such statements would be at least equivalent to the letters in competency and relevancy as well as in evidential character and weight. Such statements might properly come, we submit, either from officers commanding the station and vessels thereon or from the commander in chief. The affidavit of Sir C. Napier, apparently received under similar circumstances in the case of *The Franciska* (Spinks' Prize Cases, 111, 116), is an illustration of such a statement. It does not appear to have been doubted that such affidavits were properly received and considered as further proof, or in the nature of further proof, in that case.

In reference to the contention of the claimant that the deposition of the prize master, Lieutenant Russell, and the prize crew, contained at pages 49 to 57 of the record, should not be considered at this hearing, it should be noted that these depositions of the prize master and the prize crew were made the basis for the order to take further proof (p. 105), and were before the court as a part of the record of the cause under section 4622 of the Revised Statutes, which directs, not only that the prize commissioners shall take the affidavit of the prize master required by section 4617, and the testimony of the witnesses sent in separate from each other on interrogatories prescribed by the court in the manner usual in prize cases, but also expressly requires:

> The prize commissioners shall also take depositions *de bene esse* of the prize crew and others at the request of the district attorney on interrogatories prescribed by the court.

It thus appears that the prize commissioners acted in this case in strict conformity with the statute in taking the depositions of the prize master and the prize crew and in returning them to the court as a part of the record of the depositions taken *in preparatorio;* and it is to be noted that this statute covers the whole subject of prize and contains the legislative policy as to procedure and as to the depositions which are to be taken and used in the hearing before the district court in all cases of prize coming before it. It is to be noticed further that these depositions were actually taken and were so returned by the prize commissioners, and were actually on file in the district court and so certified by the clerk of the district court.

It is submitted that whatever may be the rule in other foreign jurisdictions as to the evidence upon which a cause is to be heard, and whatever may have been the customary practice of English prize courts in this particular, the act of 1864, which is practically Title LIV of the Revised Statutes, has fixed and settled the practice for the United States courts and determined the competency and regularity of these depositions of the prize master and the prize crew as a part of the record before the prize court in the first instance.

It further appears, in addition to this statutory necessity and regularity of these depositions, that there has been no action of record in the court below suppressing these depositions or giving them any limited effect.

These remarks are submitted in view of the statutory regulations and in view of the regularity of the practice

thereunder. We beg to say, however, that in the argument of this case on the merits we have not referred to or quoted from any one of these depositions of the prize master or prize crew taken *in preparatorio*, but have rather relied upon the concurrent testimony of the officers of the *New Orleans*, as quoted.

Further, we beg to call the attention of the court to the fact that by the order of the court below granting further proof (fol. 230) both to the captors and to the claimants the time was limited, and that after the captors had put in their proof the claimants, without adducing any further proof, went to a hearing of this cause on the merits, and yet claimed to reserve their right of adducing further proof "as it may hereafter be advised." (Fol. 379.)

Of this remarkable procedure the court below was moved to say:

> There has been considerable delay in taking the additional testimony, owing to the absence from the country of the chief witnesses, but all the testimony in behalf of the captors is now in, and the case is before the court upon a motion to discharge the vessel, proctors for the claimants reserving the right to introduce testimony hereafter, *if the motion is denied*, without passing upon the question whether, in a proceeding in admiralty, a party having an opportunity to offer testimony failing to do so may draw the opinion of the court upon his adversary's case, and thereafter be permitted to reply to it, a question of practice which is at least doubtful, as counsel were duly warned. (Fol. 383.)

It thus appears that the claimants deliberately, and after warning, did not put in any testimony in the court

below according to their opportunity, and to ask now for further proof after the long delay is against the settled practice of this court, when a cause in admiralty is before this court finally on its merits, with all the proofs that might have been put in below.

After the court has looked into this cause, if there is any doubt in the mind of the court on this record, the court may, *sua sponte*, order further proof, but without a hearing or in advance of the hearing there does not appear in this record any adequate reason for such a step.

Moreover, it is to be observed that the order of the district court for further proof was limited in the subject-matter of the proof, as follows:

> Ordered, that the captors have ninety days from the date hereof to supply further proof as to the entry of the *Olinde Rodrigues* into the port of San Juan, Porto Rico, on July 4, 1898, and as to courses and movements of said vessels on July 17, 1898, and that the claimants may thereafter have such time to offer testimony *in reply* as may seem proper to the court (fol. 230).

By this express limitation of the subject-matter of the further proof, the movement of the *Olinde Rodrigues* and of the *New Orleans* on July 4 and July 17, and the claimants' reply thereto, all other testimony was incompetent in the court below, and therefore the letters which the claimants now seek to introduce in evidence do not come within the limits of this order for further proof, and, again, do not appear to have been introduced in evidence by the claimants in the court below, because the record shows that the claimants did not introduce any evidence after the further proof taken for captors, but, on the

contrary, went to a hearing of the cause expressly claiming the right to introduce further proof thereafter, *if the motion should be denied* (fol. 379).

Indeed, the principle is that, upon further proof allowed and taken and the cause heard, it is not opened again. This is settled procedure.

At page 429, Upton's Maritime Warfare and Prize, third edition, it is thus stated: "On return of further proof allowed, if any taken, the cause is again heard in its order upon the original and supplementary proof, and not again opened."

We respectfully submit that the motion should be denied.

JOHN K. RICHARDS,
Solicitor-General.
HENRY M. HOYT,
Assistant Attorney-General.
J. P. KENNEDY BRYAN,
For the Captors.

No. 704.

Office Supreme Court U. S.
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In the Supreme Court of the United States.

OCTOBER TERM, 1898.

THE UNITED STATES, APPELLANT,
v.
THE STEAMSHIP "OLINDE ROUSSEL," La Compagnie Générale Transatlantique, claimant.

No. 704.
In Prize.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

REPORTS OF CERTAIN OFFICERS AS TO SAN JUAN BLOCKADE AND AFFIDAVITS BEARING UPON THE SAME.

In the Supreme Court of the United States.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

REPORTS OF CERTAIN OFFICERS AS TO SAN JUAN BLOCKADE AND AFFIDAVITS BEARING UPON THE SAME.

[Letter of Capt. C. D. Sigsbee, U. S. N.; Appendix to Report to the Chief of the Bureau of Navigation, 1898, p. 224.]

U. S. S. ST. PAUL,
Mole St. Nicholas, Haiti, June 27, 1898.

SIR: Instead of leaving the blockade of San Juan to-night to proceed direct to New York for coal, in conformity with your order to me to proceed when necessity arose, I decided yesterday to come here instead, in order

to recommend to you promptly an increase of the blockading force off San Juan, where the *Yosemite* now remains alone, and where the *St. Paul* was alone before the *Yosemite* arrived. Had I remained off San Juan until to-night my coal would not have brought me here and permitted me to go to New York also; I therefore decided to sacrifice one day, in order that my recommendation to you should not be delayed for a number of days, as would have been the case had I proceeded direct to New York.

It was immediately demonstrated to the *St. Paul*, on her arrival off San Juan, that she would not be permitted to approach the batteries undisturbed. In fact, Spanish war vessels endeavored to entice her under the batteries, which, as you know, are very heavy.

I beg to respectfully suggest that the difficulties of blockading the single port of San Juan are greater than those to be met in blockading Havana, where there are no Spanish war vessels and no torpedo-boat destroyers, and where ports are blockaded both to the eastward and westward, thus giving flank support. Vessels intending to run the blockade of San Juan can, owing to the short length of Porto Rico east and west, make telegraphic communications with San Juan for advice with reference to the disposition of the blockading force, and this they can do within a few hours of their expected arrival at that port. This can be done by visiting the east and west anchorages of the island or St. Thomas. San Juan being well to windward in the trade region, and having no land influences to windward of it, the seas off that port are naturally continuously rough day and night, making boarding both prolonged and difficult, especially for auxiliary crews. When a single vessel constitutes the blockading force, she will oftentimes be compelled to make the visit close in to the port, where she will be uncommonly exposed to attack during the visit.

I was the more impelled to leave San Juan a day in advance of my original intention by my belief, based on reports from the harbor of San Juan, that the torpedo boat *Terror* could not, within the single day devoted to my visit here, repair the damage done to her by the *St. Paul*, in regard to which I refer you to another letter of this date. It is advisable to constantly keep the *Terror* in mind as a possible active force; but leaving her out of consideration, the services to be performed by the *Yosemite*, of blockading a well-fortified port containing a force of enemy's vessels whose aggregate force is greater than her own, is an especially difficult one. If she permits herself to be driven away from the port, even temporarily, the claim may be set up that the blockade is broken. It was still more difficult for the *St. Paul* when she was alone on the blockade. The *St. Paul's* speed was reduced, by an accident to her starboard engine, within two knots of the maximum speed of the *Yosemite*. That made but little difference, except in chasing, for the reason that she also had to maintain the blockade as against any force of the enemy.

I venture to suggest that, in order to make the blockade of San Juan positively effective, a considerable force of vessels is needed off that port, enough to detach some occasionally to cruise about the island. West of San Juan the coast, although bold, has outlying dangers, making it easy at present for blockade runners having local pilots to work in close to the port under the land during the night.

Very respectfully,

C. D. SIGSBEE,
Captain, U. S. N., Commanding.

The SECRETARY OF THE NAVY.

[Report of Commander C. H. Davis, U. S. N.; Appendix to Report to the Chief of the Bureau of Navigation, 1898, p. 642.]

U. S. S. DIXIE,
Off Porto Rico, July 26, 1898.

SIR: I have the honor to report that in obedience to your order of the 24th instant I stood into San Juan, Porto Rico, and found only the *New Orleans*, Captain Folger, blockading off that port.

Captain Folger kept me through the night of the 24th, as he had information which led him to believe that an attack would be made on his ship during the night.

There are in San Juan, Porto Rico, the *Terror*, torpedo gunboat; the *Isabella II*, cruiser; a torpedo boat, and a gunboat; there is also a German steamer, which is only waiting an opportunity to slip out.

The *New Orleans* is the only ship I have sighted on the coast of Porto Rico. Captain Folger had no knowledge of the whereabouts of the *Prairie* or *Montgomery*.

Captain Folger directed me to report that one ship was inadequate for the blockade of San Juan, and there should be more than two ships off that port to establish an effectual blockade.

The *New Orleans* could not approach within less than 6 miles of the entrance of San Juan without drawing the fire of the batteries, mounting 8-inch guns well served. It is Captain Folger's opinion that the enemy will attempt to raise the blockade of San Juan, and it is my opinion that he should be reenforced there with the least possible delay.

On the morning of the 25th, in the execution of your orders, I went to San Juan to collect any force that might be there, but found no United States ships there. I took as a prize the French steamer, *Manoubia*, of Marseilles, from Martinique, bound for Sagua la Grande, Cuba. I

have made her the subject of a separate letter to the commander in chief, which I herewith inclose.*

I am, sir, your obedient servant,

C. H. DAVIS,
Commander, Commanding.

Capt. F. J. HIGGINSON, U. S. N.,
Commanding U. S. S. Massachusetts,
Senior Officer Present.

[Affidavit of Capt. C. H. Davis, U. S. N.]

CITY OF WASHINGTON,
District of Columbia, ss:

CHARLES HENRY DAVIS, now captain, United States Navy, being duly sworn, deposes and says that in his report to Capt. F. J. Higginson, U. S. N., dated from the U. S. S. *Dixie*, off Porto Rico, July 26, 1898, and appearing on pages 642 and 643 of the Appendix to the Report of the Chief of the Bureau of Navigation (Washington, Government Printing Office, 1898), the opinions expressed as to the efficiency of the blockade of San Juan, Porto Rico, by the U. S. S. *New Orleans*, as he verily believes, refer to the desirability of reenforcement for the blockade as a military blockade only and in order to be prepared to resist hostile attack; that he himself expressed in said report the opinion that Captain Folger should be reenforced for this reason only; and that his own opinion was and is clear that the blockade of the port of San Juan was effective as a commercial blockade, as shown by the stop-page and seizure record of the respective blockading vessels.

C. H. DAVIS,
Captain, U. S. N.

Subscribed and sworn to before me this 31st day of March, 1899.

[SEAL.]

JOS. P. RUDY,
Notary Public, D. C.

[Affidavit of Capt. W. M. Folger, U. S. N.]

STATE OF VIRGINIA,
County of Warwick, ss:

I, W. M. FOLGER, captain, U. S. Navy, being duly sworn, depose and say that I have read a copy of the report of Commander C. H. Davis, commanding the U. S. S. *Dixie*, to Capt. F. J. Higginson, senior officer present, dated off Porto Rico, July 26, 1898, and contained on pages 642 and 643 of the Appendix to the Report of the Chief of the Bureau of Navigation for the year 1898; that the facts therein stated referring to me are true; that the statements and opinions therein attributed to me were made and expressed by me with reference only to the military efficiency of the blockade of San Juan, in view of the probability of hostile attack, and not to the effectiveness thereof as a commercial blockade; that I was and am of the opinion that the blockade of the port of San Juan as a commercial blockade was effective, and that this is shown by the stoppage and seizure record of the respective blockading vessels.

W. M. FOLGER,
Captain, U. S. Navy.

Subscribed and sworn to before me this 31st day of March, 1899.

[SEAL.] J. L. MARYE, Jr.,
Notary Public.

[Certified to be a true copy from the original in the records of the Department.—Charles H. Allen, Acting Secretary of the Navy.]

U. S. S. YOSEMITE,
Blockade off San Juan, Puerto Rico, July 3, 1898.

SIR: 1. I have the honor to report the following vessels beached, destroyed, or warned since Sunday, June 26, since which time the *Yosemite* has been the only vessel blockading this port.

2. Tuesday, 28th, Spanish steamer between 4,000 and 5,000 tons displacement, name unknown, beached and apparently bilged in the same position as run on shore and deserted.

3. On Wednesday, June 29th, overhauled Spanish three-masted schooner *Joven Maria*, about 50 tons displacement, laden with salt; brought to near reefs; old and unseaworthy; scuttled.

4. Sunday, July 3, overhauled English steamer *Cayo Blanco*, of London, to Jamaica, but apparently entering San Juan. Warned and warning entered on her register.

5. Sunday, July 3, overhauled with difficulty English steamer *H. M. Pollock*, of London. Had sailed from Arecibo, a port a short distance to the westward of this place, cleared for Port Medio Mundo, on eastern end of island. Overhauled the vessel carefully and found her partially loaded with a cargo of sugar. Have no doubts, from the efforts of the vessel, that she intended to go into San Juan. Warned the master and entered the warning in the log. When the *Pollock* was last seen she was hull down to the eastward of San Juan Harbor.

I have the honor to be, very respectfully,

W. H. EMORY,
Commander, U. S. Navy, Commanding.

To the COMMANDER IN CHIEF,
United States Naval Force,
North Atlantic Station.

[Certified to be a true copy from the original in the records of the Department.—Charles H. Allen, Acting Secretary of the Navy.]

U. S. S. YOSEMITE,
Blockade off San Juan, Puerto Rico, July 10, 1898.

SIR: 1. At 11.30 p. m. on Saturday, July 9, boarded and warned the ocean steamer *Gallicia*, of Hamburg.

2. This steamer gave the *Yosemite* an exciting chase of three hours' duration—exciting because she had every appearance of a Spanish troop ship.

3. When first sighted she was headed for Porto Rico, but upon seeing the *Yosemite*, headed to the northward and westward. When the chase was overhauled she was going east at a speed of 15 knots an hour.

4. In connection with the overhauling of the *Galicia* it will be remembered that on Saturday, June 25, just two weeks ago, the *St. Paul* overhauled and warned off the Hamburg steamer, a sister ship of the *Galicia*.

I have the honor to be, very respectfully,

W. H. EMORY,
Commander, U. S. N., Commanding.

To the COMMANDER IN CHIEF,
United States Naval Force,
North Atlantic Station.